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CASE NO:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

Winston B. McCall, Jr.,

PETITIONER,

v.

City of Birmingham, Alabama;
Arthur Deutch, in his official capacity
as Chief of Police of the
Birmingham Police Department,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented by this petition for review, are as follows:

1. Whether review by this Court is mandated by the necessity to correct the unconscionable and substantial damage inflicted upon the First Amendment rights of freedom of speech caused by the Eleventh Circuit's decision denying standing to Petitioner to protect such First Amendment rights in the Federal Courts.

2. Whether review by this Court is mandated by the fact that the Eleventh Circuit's decision is in direct conflict with numerous decisions of the US Supreme Court.

3. Whether review by this Court is mandated by the fact that the Eleventh Circuit's decision is in direct conflict with the decisions of other Circuit Courts.

4. Whether review by this Court is mandated by the fact that the Eleventh



Circuit's decision is in direct conflict with the Eleventh Circuit Court's prior decisions.



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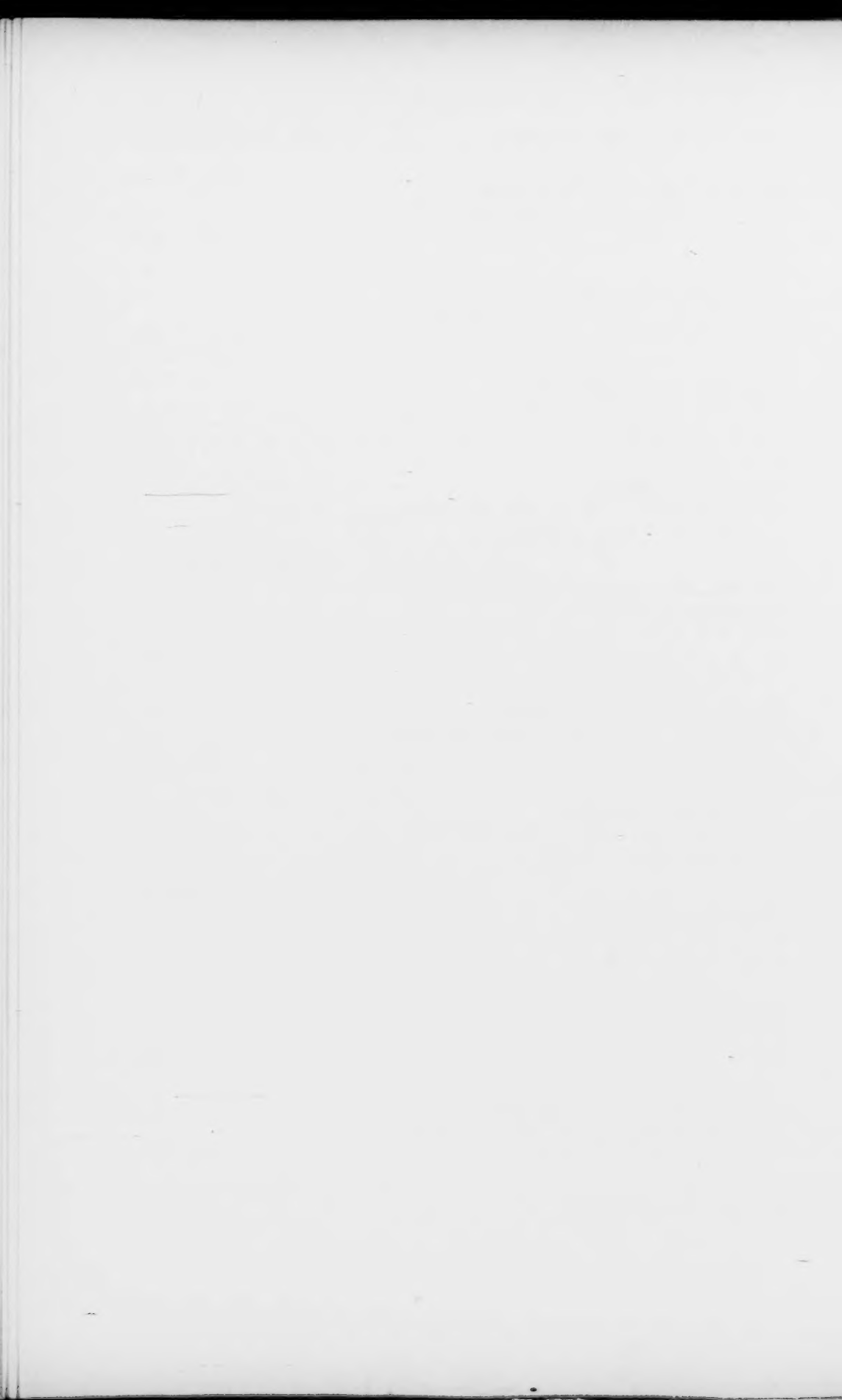
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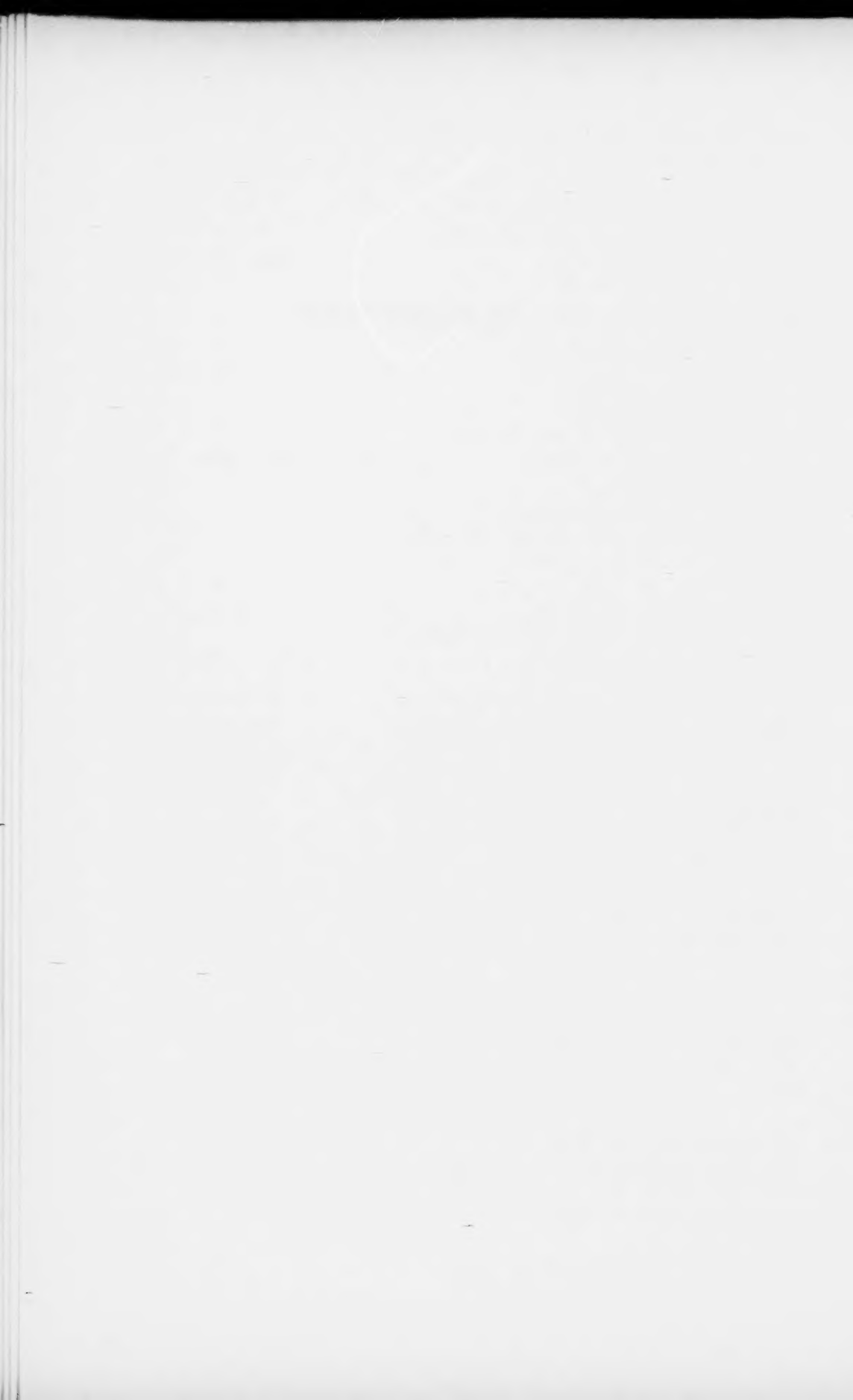
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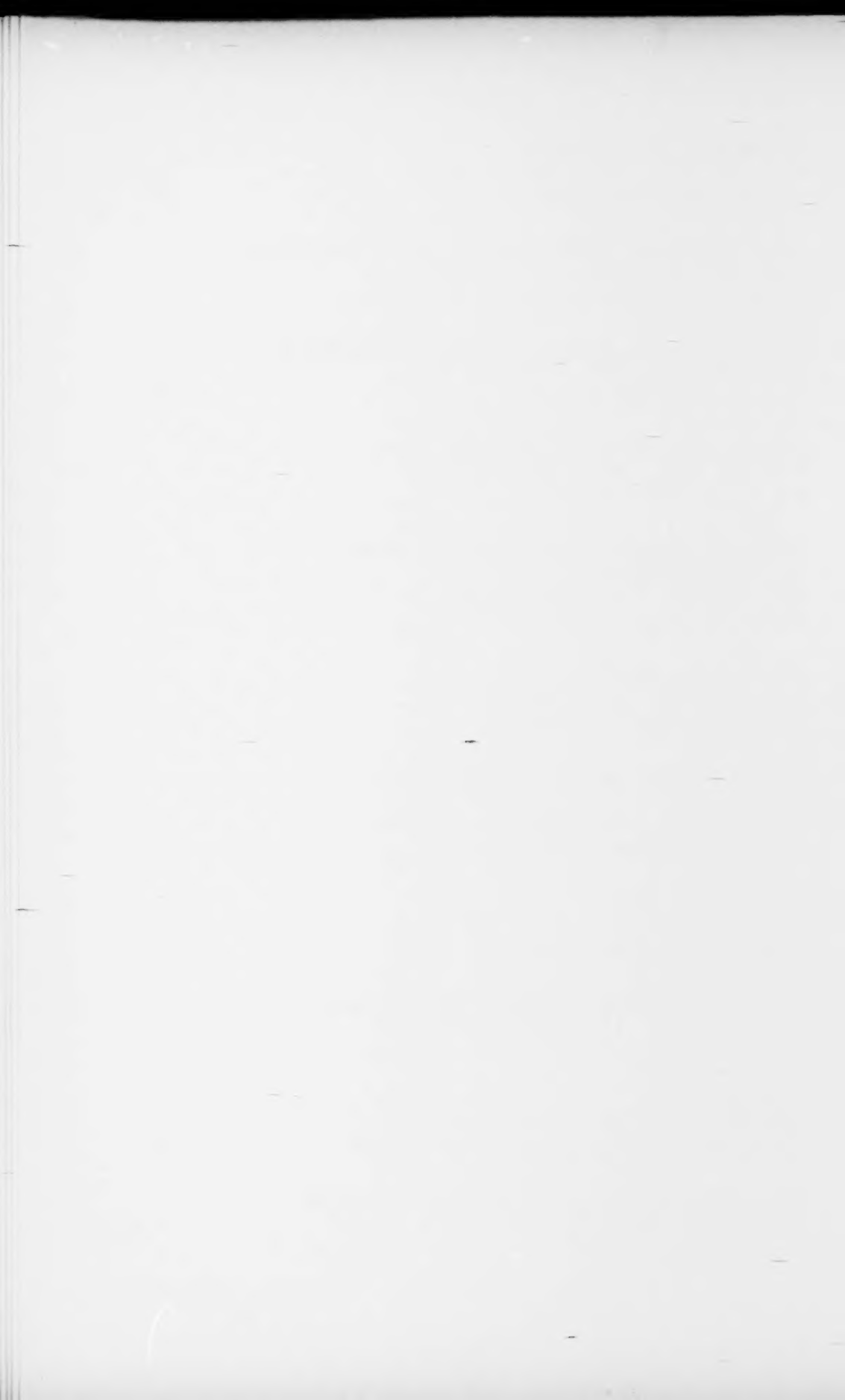
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

Winston B. McCall, Jr.,

PETITIONER,

v.

City of Birmingham, Alabama:
Arthur Deutch, in his official capacity
as Chief of Police of the
Birmingham Police Department

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, Winston B. McCall, Jr.,
respectfully petitions this Court for the
issuance of a Writ of Certiorari to review
the final judgement of the United States
Court of Appeals for the Eleventh Circuit
denying Petitioner standing in the Federal
District Court to seek a declaratory
judgment, among other relief, that two

Birmingham ordinances, on their face and as applied to Petitioner, unconstitutionally deny Petitioner his rights of freedom of speech and equal protection of the laws.¹

REPORTS OF OPINIONS DELIVERED IN CASE

The decision of the Court of Appeals was not published. (931 F 2d 903) A copy of that decision is included herein in Appendix A, p. 67.

The final judgement and memorandum opinion of the District Court was rendered on May 28, 1990, which was not reported. A copy of that judgement and opinion are included herein in Appendix B, p. 69 and Appendix C, p 70, respectively.

The statutory basis for federal jurisdiction in the District Court was Title 28 USC § 1343(3)

¹. The caption of this case contains the names of all parties to this proceeding. The City of Birmingham, Alabama is a municipal government.



JURISDICTIONAL GROUNDS

The final judgement of the Court of Appeals, which is sought to be reviewed, was rendered on March 28, 1991. (Appendix A, p. 67).

The jurisdiction of this Court is invoked under Title 28 USC § 1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

The following Constitutional and statutory provisions are involved.

(A) UNITED STATES CONSTITUTIONAL PROVISIONS

United States Constitution: Article III, Section 2, Clause 1.

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; -- to all cases affecting ambassadors, other public ministers and consuls; -- to all cases of admiralty and maritime jurisdiction; -- to controversies to which the United States shall be a party; -- to controversies between two or more states; -- between a state and citizens of another state; -- between citizens of different states; -- between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens



thereof, and foreign states, citizens or subjects."

United States Constitution: Amendment I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances."

United States Constitution: Amendment XIV.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(B) BIRMINGHAM ORDINANCES

The two Birmingham ordinances sought by Petitioner to be declared unconstitutional, are as follows:

Section 11-6-10 of the General Code of the City of Birmingham, Alabama, 1980, (hereinafter referred to as "Harassment Ordinance") reads as follows:



Sec. 11-6-10 Harassment Ordinance:

(a) A person commits the offense of Harassment if, with intent to harass, annoy or alarm another person:

. . .

(2) He directs abusive or obscene language or makes an obscene gesture towards another person.

Section 11-6-12 of the General Code of the City of Birmingham, Alabama, 1980, (hereinafter referred to as "Public Intoxication Ordinance") reads as follows:

Sec. 11-6-12 Public Intoxication

(a) A person commits the offense of public intoxication if he appears in a public place under the influence of alcohol, narcotics or other drugs to the degree that he endangers himself or another person or property, or by boisterous and offensive conduct annoys another person in his vicinity.

(emphasis added)

STATEMENT OF THE CASE

On March 19, 1990, Petitioner, Winston B. McCall, Jr. (hereinafter referred to as "McCall") instituted this civil action in the District Court for the Northern District of Alabama against the Respondents: City of Birmingham, Alabama, and Arthur Deutch, in



his official capacity as Chief of Police of the Birmingham Police Department.

(Respondents are hereinafter collectively referred to as "Birmingham").

McCall asserted a cause of action under Title 42 USC § 1983 claiming that, by reason of the existence and enforcement of the Harassment and Public Intoxication Ordinances, McCall is being deprived of his constitutional rights of freedom of speech and equal protection of the laws.

McCall, in his complaint (Appendix E, p. 76), sought a declaratory judgement, pursuant to Title 28 USC § 2201, that the Harassment Ordinance and the Public Intoxication Ordinance are unconstitutionally overbroad and vague on their face and as applied to McCall's intended speech, and that the Public Intoxication Ordinance, on its face and as applied to McCall's intended speech, unconstitutionally denies McCall "equal



protection of the laws" under the Fourteenth Amendment. McCall also sought a permanent injunction against prospective enforcement of each of the two Birmingham ordinances.

Birmingham filed a document styled "Motion for Summary Judgement or in the Alternative to Dismiss". McCall thereafter timely filed an affidavit in opposition to Birmingham's motion for summary judgement, the contents of which also corroborate and support McCall's allegations in his complaint. (Appendix F, p. 93)

McCall's complaint was thereafter "Dismissed" by order of the District Court entered on May 25, 1990 (Appendix B, p. 69) on the grounds that McCall lacked standing to bring the action. (See the District Court's memorandum opinion, Appendix C, p. 70). The District Court indicated that its ruling was pursuant to Birmingham's alternative Motion to Dismiss based upon that Court's order of dismissal and that

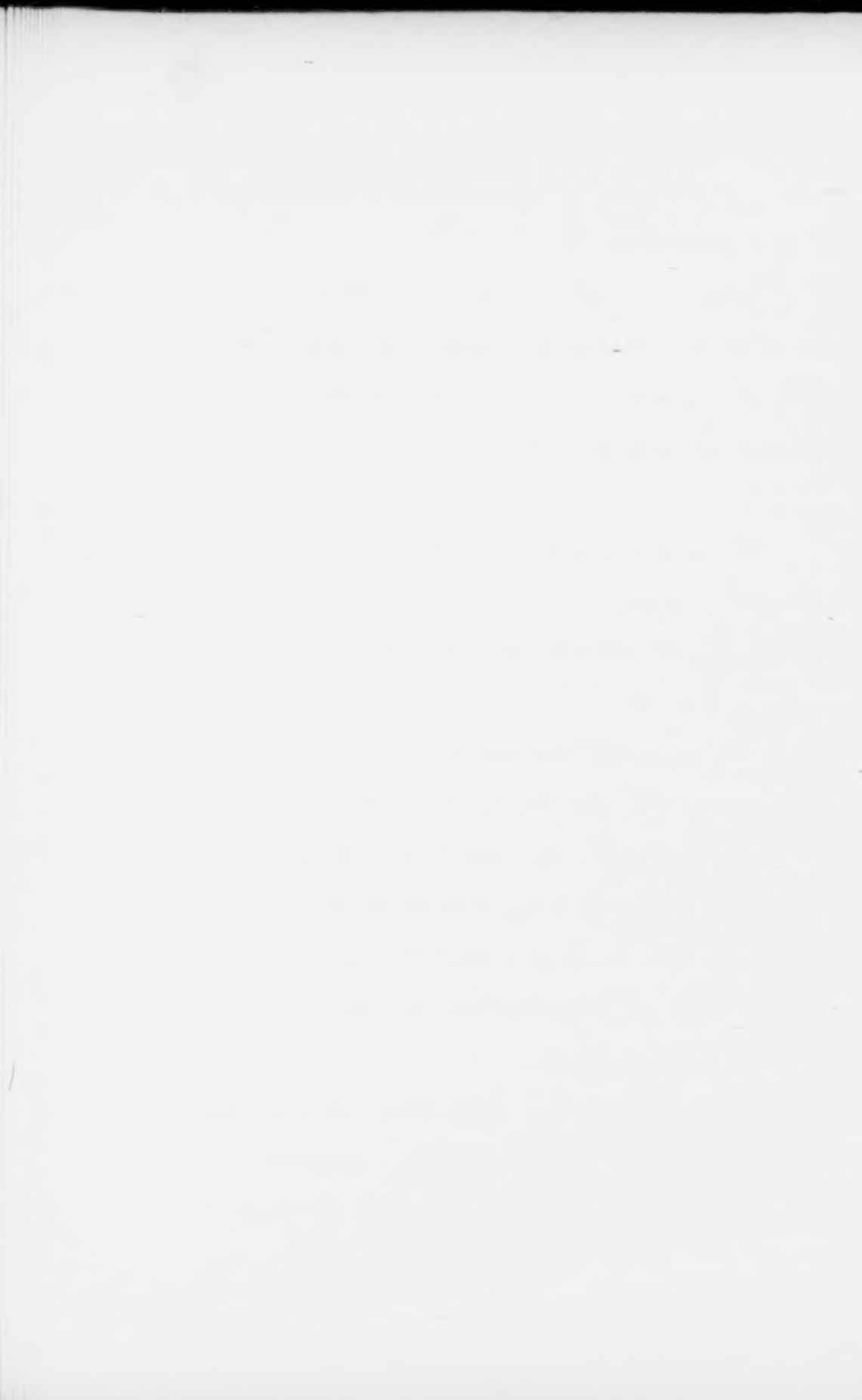


Court's references in its opinion to McCall's failure to make certain allegations in his complaint.

McCall thereafter filed a motion with the District Court to amend his complaint to correct typographical errors, which was granted by the District Court. (Appendix G, p. 102)

On June 13, 1990, McCall filed a notice of appeal from the District Court's dismissal of the action, to the Court of Appeals for the Eleventh Circuit. The Eleventh Circuit, on March 28, 1991, adopted the opinion of the District Court, and affirmed the District Court's judgment. (Appendix A, p. 67) By reason of such adoption, the District Court's opinion shall be referred to hereinafter as the opinion of the Court of Appeals.

On June 12, 1991, the Honorable Anthony M. Kennedy, Associate Justice, granted Petitioner an extension of time, to July 15,



1991, in which to file this petition.

(Appendix D, p. 75)

STATEMENT OF THE FACTS

The following statement of facts was abstracted from the allegations in McCall's complaint (Appendix E, p. 76) and in McCall's affidavit (Appendix F, p. 93), both of which were a part of the record on appeal to the Eleventh Circuit.

McCall, while in a non-intoxicated state and while in an intoxicated state, intends to and will engage in pure speech that will be directed to Birmingham police officers (including two specifically identified police officers), while such officers are engaged in the performance of their duties. Such speech will be engaged in in a public forum in the City of Birmingham.

The speech that McCall will direct to such officers and the context and circumstances in which such speech will occur is set out in detail in paragraphs #8



and #9 of McCall's complaint (Appendix E, p. 76). The speech that McCall will direct to such officers is that McCall will call such police officers a "son of a bitch" in protest of the prior arrests under each of the Birmingham ordinances of a friend of McCall's for engaging in the same speech.

If McCall engages in such speech, Birmingham will enforce the two ordinances and will arrest and prosecute McCall under the Harassment Ordinance and the Public Intoxication Ordinance for his intended speech. (Paragraph #10 of McCall's complaint (Appendix E, p. 76) As shown, each of the two ordinances have previously been enforced by arrests of a friend of McCall's for engaging in the exact same speech directed to the same two specifically identified police officers to whom McCall will direct his speech. McCall's friend has been arrested for engaging in such speech to such officers on two separate occasions under the



Harassment Ordinance and on one occasion under the Public Intoxication Ordinance.

By reason of the existence and continued enforcement of the Harassment and Public Intoxication ordinances under similar circumstance, McCall is afraid of being arrested and prosecuted under each of such ordinances for his intended speech and therefore McCall has refrained from engaging in such intended speech to avoid such arrest and prosecution. But for the existence of each of such ordinances, McCall would engage in his intended speech.

Because the Harassment and Public Intoxication ordinances have and continued to totally inhibit and deter McCall's exercise of his intended speech, McCall filed a complaint in the District Court to have each of such ordinances declared unconstitutional. (Appendix E, p. 76)



REASONS FOR GRANTING THE WRIT

The compelling reasons for granting the requested writ are:

(1) This case involves significant constitutional issues which, if not reviewed and resolved at this time by this Court, will result in substantial impairment of the rights of freedom of speech as guaranteed by the First Amendment.

(2) The Court of Appeals for the Eleventh Circuit has decided an important federal question in a way that directly conflicts with controlling decisions of this Court.

(3) The Court of Appeals has decided an important federal question in a way that directly conflicts with the decisions of other Courts of Appeal.

(4) The Court of Appeals has decided an important federal question in a way that directly conflicts with previous decisions of that Court of Appeals.

(1) REVIEW BY THIS COURT IS NECESSITATED BY THE UNCONSCIONABLE AND SUBSTANTIAL DAMAGE INFLICTED UPON THE RIGHT OF FREEDOM OF SPEECH CAUSED BY THE ELEVENTH CIRCUIT'S DENIAL OF STANDING TO PETITIONER TO PROTECT SUCH RIGHT IN THE FEDERAL COURTS

Profoundly significance constitutional issues are implicated when Article III standing is denied to a litigant, who seeks, through an action initiated in Federal Court, to enforce and protect his First Amendment rights to engage in speech directed to police officers, in protest or critical of such officers' (or their fellow officers') official conduct. This Court's review of the Eleventh Circuit's decision is thereby essential to restore the resulting devastation, caused by that Court's decision, to the 200 year old constitutional principle that public officials are the servants, not the masters, of the public, and must remain subject and receptive to the will and criticism of the public.

This Court in New York Times Company vs. Sullivan, 376 US 254, 11 L Ed 2d 686, 84



S Ct 710 (1964) expressly recognized not only the constitutionally protected right, but also the duty, of members of the public to criticize public officials, by its pronouncement that:

"`public men, are, as it were, public property', and `discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.'"

Further, this Court in Wood v. Georgia, 370 US 375, 8 L 2d 569, 577, 82 S Ct 1264 (1962) placed the highest value on that constitutional right, when it confirmed that:

"Free discussion of the problems of society is a cardinal principle of Americanism - a principle which all are zealous to preserve."

and that the primary purpose of the First Amendment is:

"to protect parties in the free publication of matters of public concern, to secure their rights to a free discussion of public events and public measures, and to enable every citizen at any time to bring government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of



the authority which the people have conferred upon them."

Wood v. Georgia, supra, at 8 L 2d 569, 581.

The judgement of the Eleventh Circuit denying standing to McCall has the pathological effect of chilling and deterring freedom of speech by every person who decides to voice criticism of an act of a public official, and thereby encases that fundamental constitutional right in an abstract and ideological form without any judicial means for its enforcement and protection in the Federal Courts. A constitution right that is incapable of enforcement in the Federal judiciary is a logical contradiction, for no such right can exist without an effective means for its enforcement.

The destiny of the Eleventh Circuit's judgement denying standing to McCall is guaranteed to become an unrelenting major premise supporting future governmental acts of censorship of the most basic aspect of



the right of freedom of speech; that being the public's right and duty to express its criticism and its "will" to its public officials and representatives. This Court has previously recognized in Carey v. Brown, 447 US 455, 65 L Ed 2d 263, 273, 100 S Ct 2286 (1980), that that right is the highest rung of the hierarchy of First Amendment and that:

"the maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the republic, [and] a fundamental principle of our constitutional system... ."

The hazards of silencing the expression of the "will of the people" and any words used to express such will have been noted by this Court in its comment in the New York Times case, *supra*, at 11 L Ed 2d 686, 700, that:

" ... order cannot be secured merely by fear of punishment for its infraction; [and] that it is hazardous to discourage thought, hope and



imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; [and] that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies"

The extent of voicing such criticism and "will" has no constitutional bounds since:

"Debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometime unpleasant sharp attacks on government and public officials." Watts v US, 394 US 705, 22 L Ed 2d 664, 89 S Ct 1399 (1969); New York Times v. Sullivan, 376 US 254, 11 L ED 2d 686, 701, 84 S Ct 710 (1964).

The sort of robust, political debate encouraged by the First Amendment engenders speech that is critical of those who hold public office and one of the prerogatives of America citizenship is the right to criticize public men and measures. Such criticism, inevitable, will not always be reasoned or moderate and public officials will be subject to vehement, caustic and sometimes unpleasant, sharp attacks. Hustler



Magazine v. Farwell 485 US, 99 L Ed 2d 41, 108 S Ct (1988); New York Times v. Sullivan, 376 US 254, 11 L Ed 2d 686, 701, 84 S Ct 710 (1964), Watts v. US. 394 US 705, 22 L Ed 2d 664, 667, 89 S Ct 1399 .

This Court has staunchly protected the constitutional principle that public officials must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protects by the First Amendment. Therefore, this Court has consistently refused to punish speech because the speech in question may have an adverse emotional impact on a public official. Boos v. Barry, 485 US 312, 99 L ED 2d 333, 345, 108 S Ct 1157 (1988).

If our government is to survive, ordinances similar to the Birmingham ordinances, which have been applied and will in this case be applied to regulated speech directed to public officials, cannot be tolerated under our Constitution. Any

attempt by government to restrict the method by which the individual members of the public express their will or criticism cannot be constitutionally tolerated and that would include any governmental order restricting such expression to only socially approved words or to words denoting definite intellectual concepts, cleansed of all emotions. Both, the expression to a public official of a speaker's emotional state of mind, as well as his cognitive state, are equally protected by the First Amendment. This Court in Cohen v. California, 403 U.S. 15, 29 L.Ed 2d 289, 91 S Ct. 1780, has acknowledged such constitutional protection, where it held that:

" . . . , we cannot overlook the fact, ... that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the constitution, while solicitous of the cognitive content of individual



speech, has little or no regard for the emotional function which, practically speaking, may often be the more important element of the overall message sought to be communicated."

As confirmed in the Cohen decision, the expression of a speaker's emotional state arising out of an evaluation of a public official's act or omissions, whether by words such as "son of a bitch" or symbolic gestures, is just as protected by the First Amendment as an expression of a critical judgement of an official's conduct in socially approved or precisely defined words, cleansed of all emotional overtures. It would appear axiomatic that the people's "will" is conveyed by the use of as many forms of words and communication as there are members of the public and any discriminatory restriction or prohibition on the use of any class of words, when spoken to public officials, will substantially eliminate the ability of, at least, a majority of our society to execute their



duty to communicate their will and their criticism to their public representatives.

If any speech to a public official is permitted to be regulated and criminally punished base upon the words used or the concepts communicated or the effect of such communication on the sensibilities of such official, the public's destiny will be similar to that of the giraffe who, while in the jaws of the lion's mouth, is unable to protest his own death.

The Eleventh Circuit, by denying McCall Article III standing, sires an infamous dilemma for any public member who intends to exercise his inherent right to engage in critical speech directed to a public official. That dilemma consist of having to suffer possible arrest and criminal prosecution for expressing his criticism or will to a public official, or otherwise to live in a prison of silence coerced by those that have secure their powers from the



public. If any member of our society should remain silent for even the briefest moment as a result of that dilemma, the sovereignty of this Country shifts from "We the People" to those to whom we have conferred powers of government. As Justice Douglas so apply stated in Broadrick v. Oklahoma, 413 US 601, 37 L Ed 2d 830, 845, 93 S Ct 2908 (1973):

"First Amendment rights, are indeed fundamental for 'we the people' are the sovereigns, not those who sit in the seats of the mighty. It is the voice of the people who ultimately have the say; once we fence off a group, and bar them from public dialogue, the public interest is the loser."

Where Birmingham, through two acts of legislation, has silenced the "will" of the people within its territorial jurisdiction, the Eleventh Circuit, through the far-reaching national influence of its decision, has planted the seeds for the growth of a new form of government lacking any constitutionally required compliance by public officials with the "will of the people". Whether the loss of the cherished



constitutional right of freedom of speech is produced by way of a municipal ordinance or by a judicial fiat denying any judicial forum for the redress for such loss, the consequence is the same; that being the coercive and constitutionally intolerable silencing of members of the public from whom all powers of government are derived.

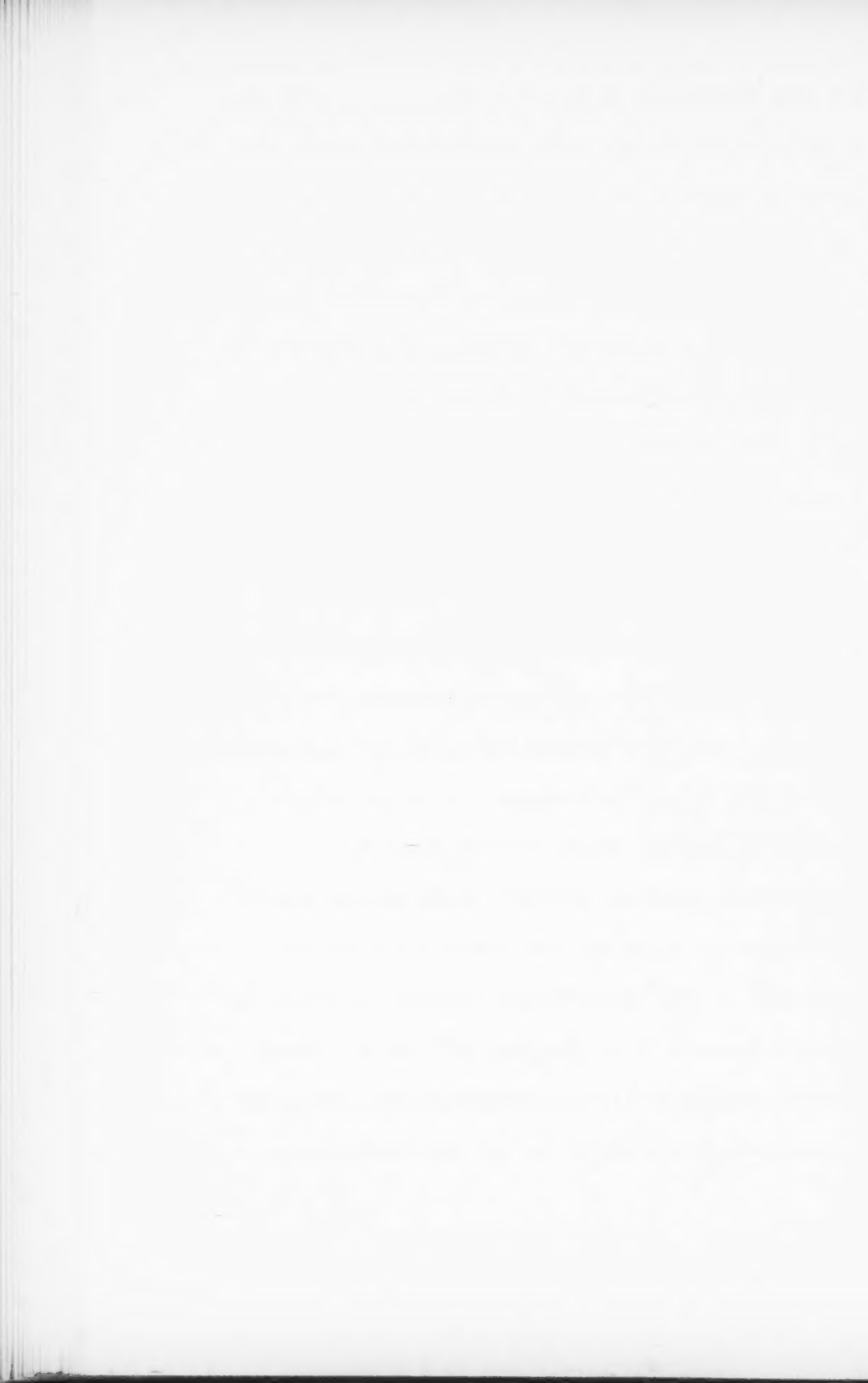
An unpublished opinion by the Eleventh Circuit will not conceal its error or the precedential value inflicted by that opinion, since the Eleventh Circuit's judgement indicates the direction of future decisions by that Circuit in similar cases. Even Pontious Pilate would have envied the means by which the Eleventh Circuit in this case washed its hands of its role as guardian and protector of such sacred Constitutional rights, by denying standing to McCall.

The spirit of the Constitution now cries for an immediate review by this Court



of the Eleventh Circuit's decision. Society must be instilled with confidence that its acts of speech to its public officials will not result in criminal or other sanctions. Such confidence can only be obtained through this Court's guidance through its review of the Eleventh Circuit's decision.

Should the hurdle of the denial of standing to McCall be overcome, the most constitutionally significant issue of the day will be ripe for decision: that issue being, the extent to which speech directed to a public official or representative is accorded greater constitutional protection under the First Amendment, than similar speech directed to an individual not performing public duties. Such issue would necessarily involve the extent to which members of the public can engage in critical speech directed to police officers, whose powers include direct suppression, through force and intimidation, of the public's



conduct through enforcement of criminal laws.

It should be further noted that the numerous cases previously accepted for review by this Court (cited in the next section of this petition) pertaining to the standing of Plaintiffs to initiate actions to protect their First Amendment rights, provides the strongest indication that the Eleventh Circuit's denial of standing in this case is a constitutional outrage, warranting this Court's review.

2. THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT SUBSTANTIALLY CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT.

The Court of Appeals cited, as the sole authority for its decision that McCall lacked standing, that Court's previous decision in Hardwick vs. Bowers, 760 F 2d 1202 (1985). That decision involved the denial of standing of two of the three party plaintiffs. The Eleventh Circuit, by relying

solely on that decision, which involved no issue relating to a statute regulating speech, completely disregarded the numerous conflicting decisions of this Court (cited below) which are far more factually and legally analogous to this case and which convincingly sustain McCall's standing to sue.

The sensitive issue of the denial of standing in cases involving claims that a Federal or State statute unconstitutionally regulates protected speech or other constitutionally protected conduct has been confronted in each of the following decisions. In those decisions, this Court either granted petitions for a writ of certiorari or noted probable jurisdiction on appeal. Such decisions resulted in an explicit or implicit finding that the plaintiff had standing to bring the action and that the Federal or State statute or

regulation in issue violated a provision of the U.S. Constitution.

Any subsequent reference herein to an implicit finding of standing of a party in any of the following cited cases, refers to the long standing principle followed by this Court of independently determining, in all cases before it, whether standing exists, even if the issue of standing was never explicitly referred to by this Court in its decision or raised by the parties or considered in the courts below. Jenkins vs. McKeithen, 395 US 411, 23 L Ed 2d 404, 416, 89 S Ct 1843 (1969). See also: Butler vs. Dexter, 426 US 262, 47 L Ed. 2d 774, 96 S Ct 1527.

Some of the following cited decisions, due to their strong similarity to the facts and issues in this case, are discussed in greater detail hereafter, as further argument in support of the granting of the requested writ.

This Court has reviewed by Petition for Writ of Certiorari numerous decisions initiated in the Federal District Courts wherein the standing issue was implicitly or explicitly considered and wherein First Amendment rights were involved. See: Steffel vs. Thompson, 415 US 452, 39 L Ed 2d 505, 541, 94 S Ct 1209 (1974) (standing explicitly found); Linmark Associate, Inc. v. Township of Willingboro, 431 US 85, 52 L Ed 2d 155, 158, (Note 1) 97 S Ct 1614 (1977) (standing explicitly found); Boos vs. Berry, 485 US 312, 99 L Ed 2d 333, 108 S Ct 1157 (1988) (standing implicitly found); Board of Trustees of the University of New York vs. Fox, 492 US 469, 106 L Ed 2d 388, 109 S Ct 3028 (1989) (standing explicitly found); Airport Commissioners vs. Jews for Jesus, Inc., 482 US 569, 96 L Ed 2d 500, 507, 107 S Ct 2568 (1987) (standing explicitly found); Ellis vs. Dyson, 421 US 426, 44 L Ed 2d 274, 95 S Ct 1691 (1975) - (standing issue



explicitly considered); Frisby vs. Schultz, 487 US 474, 101 L Ed 2d 420, 108 S Ct 2495 (1988) (standing implicitly found); Doran vs. Salem Inn, Inc., 422 US 922, 45 L Ed 2d 648, 95 S Ct 2561 (1975) - (standing explicitly found).

This Court has reviewed by Appeal [now by certiorari under revised Title 28 USC § 1254(1)] numerous decisions initiated in the Federal District Courts, wherein the standing issue was implicitly or explicitly considered in cases involving freedom of speech or other First Amendment freedoms. See: Wooley vs. Maynard, 430 US 705, 51 L Ed 2d 752, 759, 97 S Ct 1428 (1977) (standing explicitly found); Babbitt vs. United Farm Workers National Union, 442 US 289, 60 L Ed 2d 895, 907 (Note 11) 99 S Ct 2301 (1979) - (standing explicitly found); Houston vs. Hill, 482 US 451, 96 L Ed 2d 398, 410 (Note 7) 107 S Ct 2502 (1987) - (standing explicitly found); Virginia vs. American

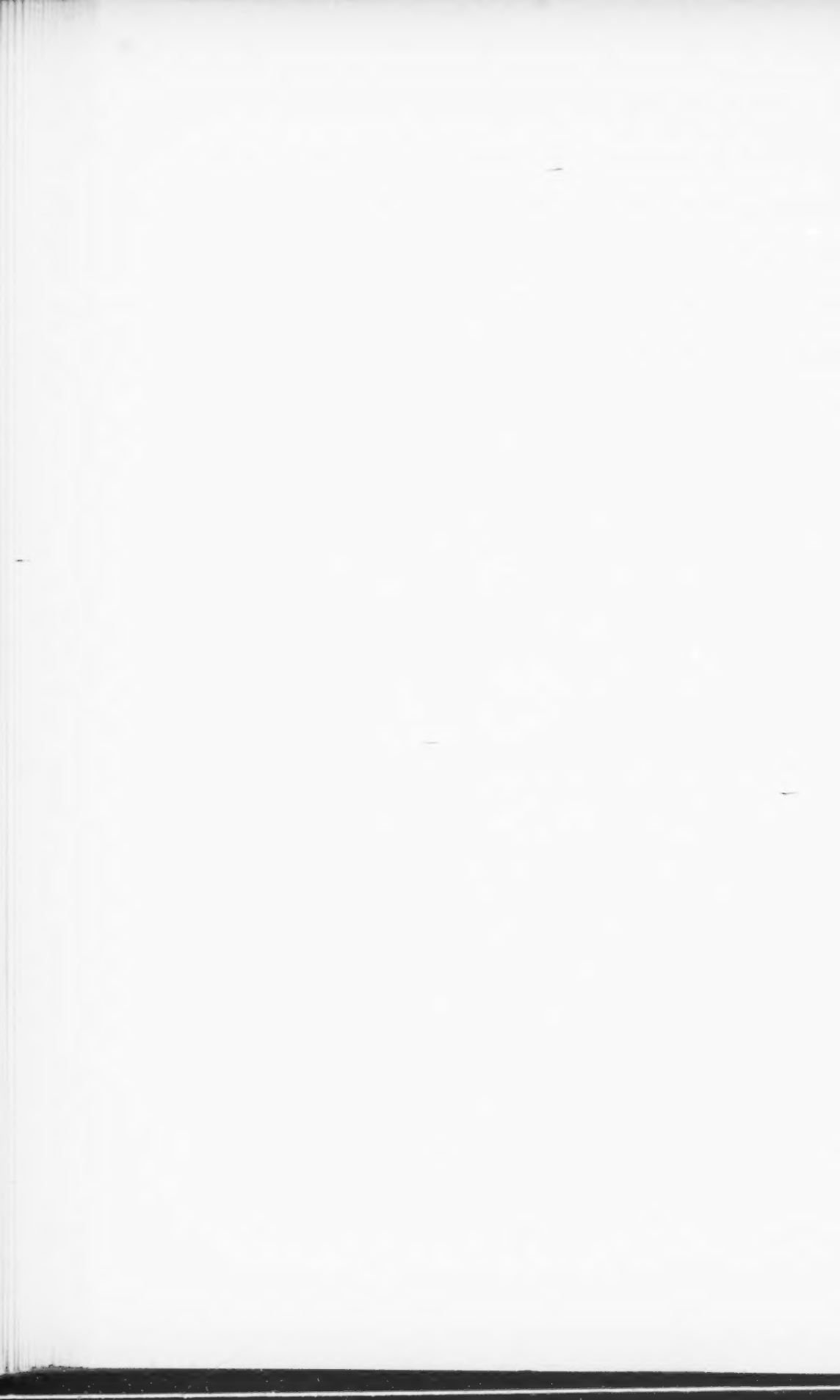


Book Seller Association, Inc., 484 US 383, 98 L Ed 2d 782, 793, 108 S Ct 636 (1988) - (standing explicitly found); Bolger v. Youngs Drug Products Corp., 463 US 60, 77 L Ed 2d 469, 103 S Ct 2875 (1983) - (standing implicitly found); Lakewood vs. Plain Dealer Publishing Company, 486 US 750, 100 L Ed 2d 771, 782, 108 S Ct 2138 (1988) - (standing explicitly found); United States vs. Grace, 461 US 171, 75 L Ed 2d 736, 103 S Ct 1702 (1983) - (standing implicitly found); Meese vs. Keene, 481 US 465, 95 L Ed 2d 415, 425, 107 S Ct 1862 (1987) - (standing explicitly found); Meyer vs. Grant, 486 US 414, 100 L Ed 2d 425, (Note 2) 108 S Ct 1886 (1988) - (standing implicitly found); Sable Communications of California vs. FCC, 492 US 115, 106 L Ed 2d 93, 109 S Ct 2829 (1989) - (standing explicitly found); Buckley vs. Valeo, 424 US 1, 46 L Ed 2d 659, 683, 96 S Ct 612 (1976) (standing explicitly found); Flash vs. Cohen, 392 US 83, 20 L Ed 2d 947,



961, 88 S Ct 1942 (1968) - (standing explicitly found); Metromedia, Inc. vs. City of San Diego, 452 US 490, 69 L Ed 2d 800, 838, 101 S Ct 2882 (1981) - (standing explicitly found); Riley v National Federation of Blind, 487 US 781, 101 L Ed 2d 669, 108 S Ct 2667 (1988) - (standing implicitly found).

This Court has reviewed by Appeal or by Petition for Writ of Certiorari several decisions initialed in the State courts wherein the standing issue was implicitly or explicitly considered in cases involving freedom of speech. See: Jenkins vs. McKeithen, 395 US 411, 23 L Ed 2d 404, 89 S Ct 1843 (1969) - (standing explicitly found); Bates vs. State Bar of Arizona, 433 US 350, 53 L Ed 2d 810, 97 S Ct 2691 (1977) (standing explicitly found); Epperson vs. Arkansas, 393 US 97, 21 L Ed 2d 228, 89 S Ct 266 (1968) (standing implicitly found); Erzonznik vs. City of Jacksonville, 422 US



205, 45 L Ed 2d 125, 95 S Ct 2268 (1975) - (standing implicitly found); Gooding vs. Wilson, 405 US 518, 31 L Ed 2d 408, 92 S Ct 1103 (1972) (standing explicitly found); Lewis vs. City of New Orleans, 415 US 130, 39 L Ed 2d 214, 94 S Ct 970 (1974) (standing explicitly found); Bigelow vs. Virginia, 421 US 809, 44 L Ed 2d 600, 95 S Ct 2222 (1975) - (standing explicitly found).

This Court has reviewed by Appeal or Petition for Writ of Certiorari numerous decisions initiated in the Federal District Courts, involving the standing issue relating to non-First Amendment conduct protected by the Constitution. See: Doe vs. Bolton, 410 US 179, 35 L Ed 2d 201, 93 S Ct 739, reh. den. 410 US 959, 35 L Ed 2d 694, 93 S Ct 1410 (1973) - (standing explicitly found); United States vs. SCRAP, 412 US 669, 37 L Ed 2d 254, 270 (Note 14), 93 S Ct 2405 (1973) - (standing explicitly found); Baker vs. Carr, 369 US 186, 7 L Ed 2d 663, 82 S Ct

691 (1962) - (standing explicitly found); Lake Carries Association vs. MacMullan, 406 US 498, 32 L Ed 2d 257, 267, 92 S Ct 1749 (1972) - (standing implicitly found); Craig vs. Boren, 429 US 190, 50 L Ed 2d 397, 405, 97 S Ct 451, reh. den. 429 US 1124, 51 L Ed 2d 574, 97 S Ct 1161 (1976) - (standing explicitly found); Association of Data Processing Service Organizations, Inc. vs. Camp, 397 US 150, 25 L Ed 2d 184, 90 S Ct 827 (1970) - (standing explicitly found); Carey vs. Population Services International, 431 US 678, 52 L Ed 2d 675, 683, 97 S Ct 2010 (1977) - (standing explicitly found); Orr v Orr, 440 US 268, 59 L Ed 2d 306, 99 S Ct 1102 (1979) (standing explicitly found);

This Court has reviewed by Petition for Writ of Certiorari several decisions of the lower Federal and State Courts implicating the standing issue involving the "equal protection clause" or the "vagueness doctrine's" relationship to the First

Amendment rights. See: Carey vs. Brown, 447 US 455, 65 L Ed 2d 263, 100 S Ct 2286 (1980) - (standing explicitly found); Police Department of the City of Chicago vs. Mosley, 408 US 92, 33 L Ed 2d 212, 92 S Ct 2286 (1972) - (standing implicitly found); Kolender vs. Lawson, 461 US 352, 75 L Ed 2d 903, 908 (Note 3), 103 S Ct 1855 (1983) - (standing explicitly found); Hynes vs. The Mayor and Council of the Borough of Oradell, 425 US 610, 48 L Ed 2d 243, 96 S Ct 1755 (1976) (standing implicitly found); Eisenstadt vs. Baird, 405 US 438, 31 L Ed 2d 349, 92 S Ct 1029 (1972) (standing explicitly found); Keyishian vs. Board of Regents of the University of New York, 385 US 589, 17 L Ed 2d 629, 87 S Ct 675 (1967) - (standing implicitly found).

The enumeration of the foregoing decisions provides the strongest possible evidence that the Eleventh Circuit's decision is blatantly in conflict with the

prior decisions of this Court and a compelling reason for the requested review by this Court of that decision and reversal of same.

MCCALL IS ENTITLED TO STANDING UNDER AN APPLICATION OF THE LIBERAL STANDING RULES

The Eleventh Circuit's decision is in conflict with this Court's repeated recognition of the liberal application of the standing rules in freedom of speech cases. Under the liberal standing rules, a plaintiff has Article III standing to assert a violation of not only that plaintiff's constitutional rights, but also standing to assert a violation of the constitutional rights of other persons who are not parties to the action. The rationale for permitting such standing to assert the constitutional claims of non-parties is that an overbroad statute chills and discourages protected speech of non-parties by the in terrorem effect of such a statute.

This Court's decisions in the following cases recognize, either implicitly or explicitly, the existence and application of the liberal standing rules to plaintiffs or others who claimed that a statute regulating freedom of speech or other First Amendment rights was unconstitutionally overbroad on its face: Airport Commissioners vs. Jews for Jesus, Inc., 482 US 569, 96 L Ed 2d 500, 507, 107 S Ct 2568 (1987); Bigelow vs. Virginia, 421 US 809, 44 L Ed 2d 600, 608, 95 S Ct 2222 (1975); Board of Trustees of the University of New York vs. Fox, 492 US 469, 106 L Ed 2d 388, 406, 109 S Ct 3028 (1989); Broadrick vs. Oklahoma, 413 US 601, 37 L Ed 2d 830, 840, 93 S Ct 2908 (1973); Craig vs. Boren, 429 US 190, 50 L Ed 2d 397, 405 (Note 4), 97 S Ct 451, reh. den. 429 US 1124, 51 L Ed 2d 574, 97 S Ct 1161 (1976); Doran v. Salem Inn, Inc. 422 US 922, 45 L Ed 2d 648, 660, 95 S Ct 2561; Eisenstadt vs. Baird, 405 US 438, 31 L Ed 2d 349, 358 (Note



5) 92 S Ct 1029 (1972); Gooding vs. Wilson, 405 US 518, 31 L Ed 2d 408, 413, 92 S Ct 1103 (1972); Lewis vs. City of New Orleans, 415 US 130, 39 L Ed 2d 214, 94 S Ct 970 (1974); Plummer vs. City of Columbus, Ohio, 414 US 2, 38 L Ed 2d 3, 94 S Ct 17 (1973); United States vs. Grace, 461 US 171, 75 L Ed 2d 736, 750 (Note 12), 103 S Ct 1702 (Marshall's concurring opinion); Virginia vs. American Book Seller Association, Inc., 484 US 383, 98 L Ed 2d 782, 793-794, 108 S Ct 636 (1988); Bates vs. State Bar of Arizona, 433 US 350, 53 L Ed 2d 810, 833, 97 S Ct 2691 (1977).

This Court has also permitted litigates standing to assert the rights of third-parties even in cases involving statutes that do not regulate speech. See: Doe v Bolton 410 US 179, 35 L Ed 2d 201, 93 S Ct 739 (1973).

The record is clear that the applicable provisions of the two Birmingham ordinances



on their face regulate pure speech and that McCall intends to engage only in pure speech and no other conduct. In such a case, the liberal standing rules under the foregoing precedents firmly establish McCall's standing to bring his action in the Federal Courts to test the facial validity of each of the Birmingham ordinances. Therefore, the Eleventh Circuit's decision is in direct conflict with the previous decisions of this Court, thereby requiring reversal of that Court's decision.

**ANALOGOUS DECISIONS OF THE SUPREME COURT
PROVIDE COMPELLING REASONS FOR
GRANTING OF THE REQUESTED WRIT**

Although there are numerous decisions by this Court, as cited above, which are persuasive authority supporting a review by this Court and a reversal of the Eleventh Circuit's decision, the following specific decisions are noteworthy.

This Court's decision in Steffel vs. Thompson, 415 US 452, 39 L Ed 2d 505, 94 S



Ct 1209 (1974) is commanding authority that McCall has standing and that this petition should be granted. The Steffel decision was even quoted approvingly by the Eleventh Circuit on several occasions in that Court's opinion in Hardwick vs. Bowers, at 760 F 2d 1202, at 1205, which was the same decision from which that Court of Appeals concluded that McCall did not have standing.

In Steffel, this Court initially considered whether the Petitioners had standing to bring an action in the Federal District Court. Steffel had twice been warned to stop distributing handbills at a shopping center and had been told that, if he continued to pass out such handbills, he would likely be arrested under a state criminal trespass statute. Although Steffel thereafter avoided any controversy by leaving the premises, Steffel's companion remained and was arrested. This Court, at 39



L 2d 505, 514, in explicitly recognizing the standing of Steffel, held that:

"Steffel had alleged threats of prosecution that could not be characterized as imaginary or speculative and that the prosecution of Steffel's hand-billing companion was ample demonstration that Steffel's concern with arrest was not 'chimerical'."

. . .

"Under such circumstances, this Court found that it is not necessary that Steffel first expose himself to actual arrest or prosecution to be entitled to challenge the statute that he claims deters his exercise of his constitutional rights."

The precedential value of the unanimous decision of this Court in Steffel requires a reversal of the Court of Appeal's decision. The following comment of Justice Stewart in his concurring opinion in Steffel, at 39 L Ed 505, 524, further necessitates a finding that McCall has standing:

"The petitioner in this case has succeeded in objectively showing that the threat of imminent arrest, corroborated by the actual arrest of his companion, has created an actual concrete controversy between himself and the agents of the state. He has,



therefore demonstrated 'a genuine threat of enforcement of a disputed state criminal statute ...'." (Emphasis added)

The fact that, under the undisputed allegations of McCall's complaint, the Birmingham ordinances will be enforced against McCall for his intended speech and that McCall has personal knowledge of the actual arrest of McCall's friend on two separate occasions by two separate Birmingham police officers for the exact same speech made to the very same police officers to whom McCall will direct his speech, is sufficient to warrant McCall's fear of arrest and prosecution if he engages in such speech. As this Court concluded in Steffel, McCall's concern that he will be arrested for his intended speech is not "chimerical" and "cannot be characterized as imaginary or speculative". One arrest for using certain speech, may indicated a probability of future arrest, but two arrests under the same circumstances clearly

indicates that McCall's arrest will be imminent for engaging in the same speech.

This Court in Steffel established that, in cases similar to McCall's, "principles of federalism not only do not preclude federal intervention, they require it", Steffel, at 39 L Ed 2d 505, 522, and confirms that the Eleventh Circuit abandoned its paramount role "as primary guardians of the constitutional rights" of McCall. Steffel, at 39 L Ed 2d 505, 517.

McCall, just as Mr. Steffel, has and will continue to suffer a judicially recognizable "injury in fact" by his prior and continuing loss of his cherished constitutional rights to speak freely without governmental restrictions and to express his will, as a member of the public, to public officials who represent him. McCall's personal stake in the outcome of this action is that he will either gain protection of his constitutional rights and

be permitted to exercise same, or he will forever lose such rights.

This Court in Linmark Associates v. Township of Willingboro 431 US 85, 52 L Ed 2d 155, 97 S Ct 1614 (1977) expressly found that one of the petitioners, who was a real estate agent, had standing to bring a §1983 action to declare a city ordinance, which prohibited the posting of a "For Sale" sign on property within the city, unconstitutional in violation of the "Free Speech clause". This Court, at 52 L Ed 2d 155, 158, found that the real estate agent had standing based merely on this Court's assumption that the agent "plainly is an immediate prospect . . . that he will desire to place 'For Sale' signs on property" in the future. In this case, for purposes of finding standing, there is no need to resort to an assumption that McCall will desire to speak to police officers, since that fact is clearly established by the record.



This Court in Wooley v. Maynard, 430 US 705, 51 L Ed 2d 752, 97 S Ct 1428 (1977) established a firm precedent for the granting of this petition. This Court in Wooley held that a petitioner's wife, who had not been arrested or directly threatened with arrest but who had knowledge of her husband's previous arrest for violating a criminal statute regulating defacement of the license plate on their automobile, had standing in her own right to attack the constitutionality of that statute. This Court's decision in Wooley involved similar facts to this case, since McCall, as Mrs. Wooley, has knowledge that his friend has been arrested for the same acts of speech that McCall intends to engage in.

In Houston vs. Hill, 482 US 451, 96 L Ed 2d 398, 107 S Ct 2502, this Court was confronted again with the standing issue involving the freedom to exercise speech directed to police officers. There, this



Court held that Hill, who alleged that he will engage in certain types of speech directed to police officers, had standing to bring an action similar to that brought by McCall. The only difference, which is not relevant to a decision in this case, between the facts in this case and in the Hill case is that Hill had previously been arrested under the statute that he sought to have declared unconstitutional. As this Court held in Hill, such prior arrests would not, in themselves, provide the requisite threat of future arrest sufficient to provide standing to Hill to seek the prospective relief that he sought. In determining that Hill had standing with respect to his demand for prospective relief, this Court placed emphasis on the existence of Hill's willingness and intention to engage in future speech that would interrupt police officers. See Houston vs. Hill, supra, at 96 L Ed 2d 398, 410, (note #7), where this



Court, in citing Steffel as authority, held that a finding in the District Court that the city ordinance had previously been constitutionally applied to Hill, was:

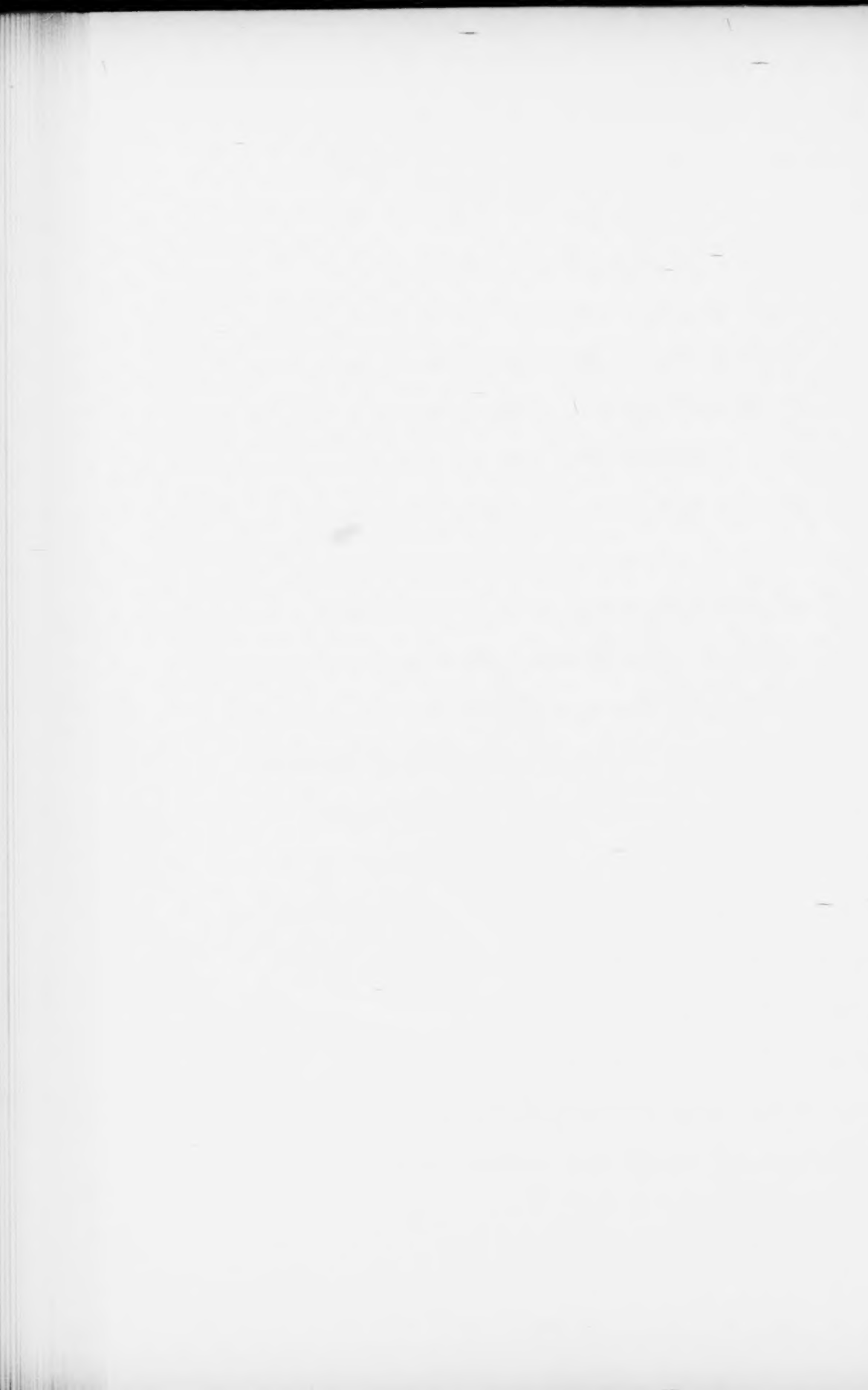
" ... irrelevant, however, to the question of Hill's standing to seek prospective relief. Hill has shown a 'genuine threat of enforcement of the statute' against his future activities (testimony of Hill's willingness to interrupt officers in the future)..." (emphasis added)

The record in this case likewise shows an analogous standing of McCall by reason of the genuine threat of enforcement of the Birmingham ordinances against McCall, who will engage in his intended speech to the police officers.

In Boos vs. Barry, 485 US 312, 99 L Ed 2d 333, 108 S Ct 1157, the Plaintiffs were, by implication, found to have standing to attack the constitutionality of a statute regulating speech near foreign embassies. The plaintiffs sought to direct certain speech to foreign dignitaries located in an



embassy in Washington, D.C., and in their complaint, as did McCall, plaintiffs described the particular type of speech that they would engage in, in front of the embassy. As distinguished from this case, the Plaintiffs in Boos alleged no previous arrest of any person under the statute, but had only alleged that two of the four party-plaintiffs had been verbally threatened with arrest. Two of the party-plaintiffs had never been threatened with arrest. The Boos plaintiffs had been motivated to engage in their intended speech due to the previous conduct by the foreign government, much in the same manner as McCall is motivated to engage in speech to police officers by reason of such officers' previous conduct of arresting his friend. This Court, after impliedly finding that all of the Boos plaintiffs (including the two plaintiffs who had never been threatened with arrest) had standing to bring the action, found certain



provisions of the challenged statue to be unconstitutional. The Boos decision, with respect to the two Plaintiffs who had not been threatened with arrest, is exactly similar to the facts in this case. This case has more compelling circumstances, than Boos, to grant the requested writ since McCall will engage in the exact same speech to the exact same police officers who, on previous occasions, arrested McCall's friend for the same speech. The threat of prosecution of McCall is far more likely than that of the two companions in Boos who had never been threatened and that of the threatened plaintiffs in Boos.

In Epperson vs. Arkansas, 393 US 97, 21 L Ed 2d 228, 89 S Ct 266, this Court was presented with a civil action which challenged the constitutionality of a 1928 "anti-evolution" statute which Arkansas had adopted to prohibit the teaching in its public schools of the theory of man's



evolution from other species of life. Epperson was a teacher employed in an Arkansas public school to teach biology. Unlike this case, at the time of the institution of the action in the District Court by Epperson, there was no record of any prosecutions in Arkansas under the "anti-evolutionary" statute during the forty years of its existence. Through the Jenkins vs. McKeithen doctrine pertaining to this Court's self-imposed duty to independently determining standing, this Court, by holding that the "anti-evolutionary" statute was unconstitutional under the establishment of religion clause again sub silentio acknowledged the requisite standing of Epperson to bring the action. The facts in this case provide far stronger evidence of McCall's standing to bring this action in the Federal District Court than the facts in the Epperson case, since there are allegations that Birmingham in fact will



enforce the two ordinances against McCall and further that there is a record of actual arrests for the exact same speech in which McCall will engage.

In Babbitt vs United Farm Workers National Union, 442 US 289, 60 L Ed 2d 895, 99 S Ct 2301 (1979), this Court was again confronted with the issue of standing and found that a Union had standing to challenge the constitutionality of the consumer publicity provisions of a comprehensive statute governing agricultural employment relations. The statute had been recently enacted and had not been enforced at the time that the Union filed its complaint, although a predecessor statute had been enforced. The publicity provisions of the statute prohibited the use of certain classes of speech defined as "dishonest, untruthful and deceptive publicity." The Union, in a similar manner as McCall in his Complaint, had alleged that it had an



interest in engaging in publicity campaigns, and also claimed that erroneous statements were inevitable in free debate. In Babbitt, this Court, at 60 L Ed 2d 895, 907, (Note 11), found that the Union had standing based upon the Union's contention that its members were being forced to forego the full exercise of their First Amendment rights, and this Court, at 60 L Ed 2d 895, 906, et seq., made the following pronouncements of law concerning the "standing to sue" doctrine which are applicable to this case and which support McCall's standing:

"When contesting the constitutionality of a criminal statute, it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.... When the Plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exist a creditable threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief... . When plaintiffs do not claim that they have been



threatened with prosecution, that prosecution is likely, or even that a prosecution is remotely possible, they do not allege a dispute susceptible to resolution by the federal court."
(Emphasis added)

The allegations in McCall's complaint and affidavit assert far more than the Babbitt standing requisites which require only that McCall's prosecution be remotely possible.

**EVEN UNDER TRADITIONAL STANDING RULES
PETITIONER HAD STANDING TO BRING THIS
ACTION**

Even under the traditional standing rules, which may or may not have been applied in the foregoing decisions, McCall has standing to bring this action.

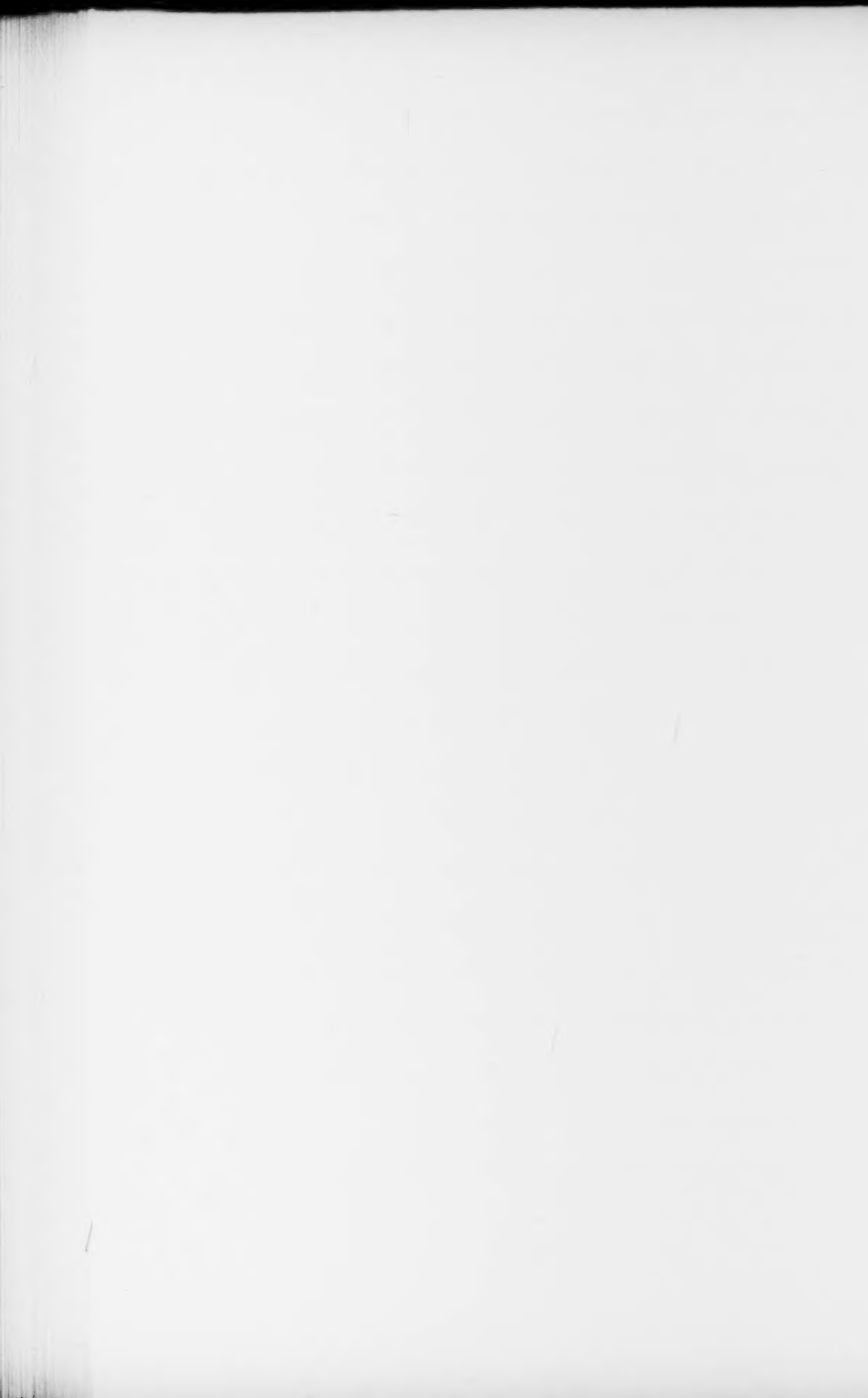
In Flash vs. Cohen, 392 US 83, 20 L Ed 2d 947, 88 S Ct 1942 (1968), this Court, without reference to the liberal standing rules, held that Petitioners had standing to sue to protect their First Amendment rights, where the Petitioners asserted that, as taxpayers, their First Amendment rights, under the "establishment of religion"



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clause, were being violated by the expenditure of federal funds appropriated by Congress under a statute to finance instruction in religious schools, and to purchase textbooks and other instructional materials for use in such schools. The threats to Petitioners' First Amendment rights in Flash were far more negligible and tenuous than the threat to McCall's First Amendment rights, yet this Court in Flash found standing to exist.

See also Jenkins vs. McKeithen, 395 US 411, 23 L Ed 2d 404, 89 S Ct 1843 (1969) where this Court, after citing Flash, held that Plaintiff's interest in his own reputation and economic well-being guaranteed that the proceeding would be an adversary one, and that, even though the defendant Commission had not tried to impose any direct sanctions on the Plaintiff, it was enough that that defendant's alleged actions would have a substantial impact on



the plaintiff, thus being a direct and substantial injury to Plaintiff. What greater personal stake could McCall have in this controversy than the loss of his own sacred constitutional right of freedom of speech, which is an ongoing injury. Would anyone contend that a person's reputation and his economic well-being, each of which owe their existence to freedom of speech, are more highly valued than that freedom?

In Doe vs. Bolton, 410 US 179, 35 L Ed 2d 201, 93 S Ct 739, a non-speech case, this Court was directly confronted with the issue of whether the Plaintiff-doctors who would supposedly be performing the abortions had standing to bring an action to determine the constitutionality of a Georgia abortion law which imposed criminal sanctions. This Court held that the doctors, who would be consulted by pregnant women, presented a justiciable controversy and had standing to bring the action despite the fact that none



of such doctors had been prosecuted or threatened with prosecution for a violation of that recently enacted abortion statute. The mere allegation that the doctors would be consulted by pregnant women and that the Doctors are the ones against whom the abortion statute was aimed, provided them with standing. It should be noted that this Court found standing even though the Georgia statute was newly enacted and no person had previously been prosecuted under that statute.

McCall, like the doctors in Doe, has not undergone any criminal prosecution nor been directly threatened by police with arrest, but McCall is the person who will engage in the intended acts of speech which not only are facially regulated by the Birmingham ordinances, but which have been previously punished under such ordinances.

There have been numerous cases (cited above) involving fact situations wherein



this Court has found standing of a Plaintiff under circumstances less indicative of the requisite elements of standing than the circumstances in this case. Notable is this Court's decision in United States vs. SCRAP, 412 US 669, 37 L Ed 2d 254, 270, 93 S Ct 2405 (note 14) where it held that standing is not limited just to those persons who have been significantly affected by governmental conduct, as McCall, but even a de minimis injury to a Plaintiff was enough of an "injury in fact" to provide standing. See also, Baker v Carr 369 US 186, 7 L Ed 2d 663, 82 S Ct 691 and Orr vs. Orr, 440 US 268, 59 L Ed 2d 306, 99 S Ct 1102 (1979).

3. THE DECISION OF THE ELEVENTH CIRCUIT DIRECTLY CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS

The Eleventh Circuit's decision is in direct conflict with decisions of the Eight, Seventh, and Fifth Circuit Courts of Appeal.

The Eight Circuit's decision in United Food and Commercial Workers International



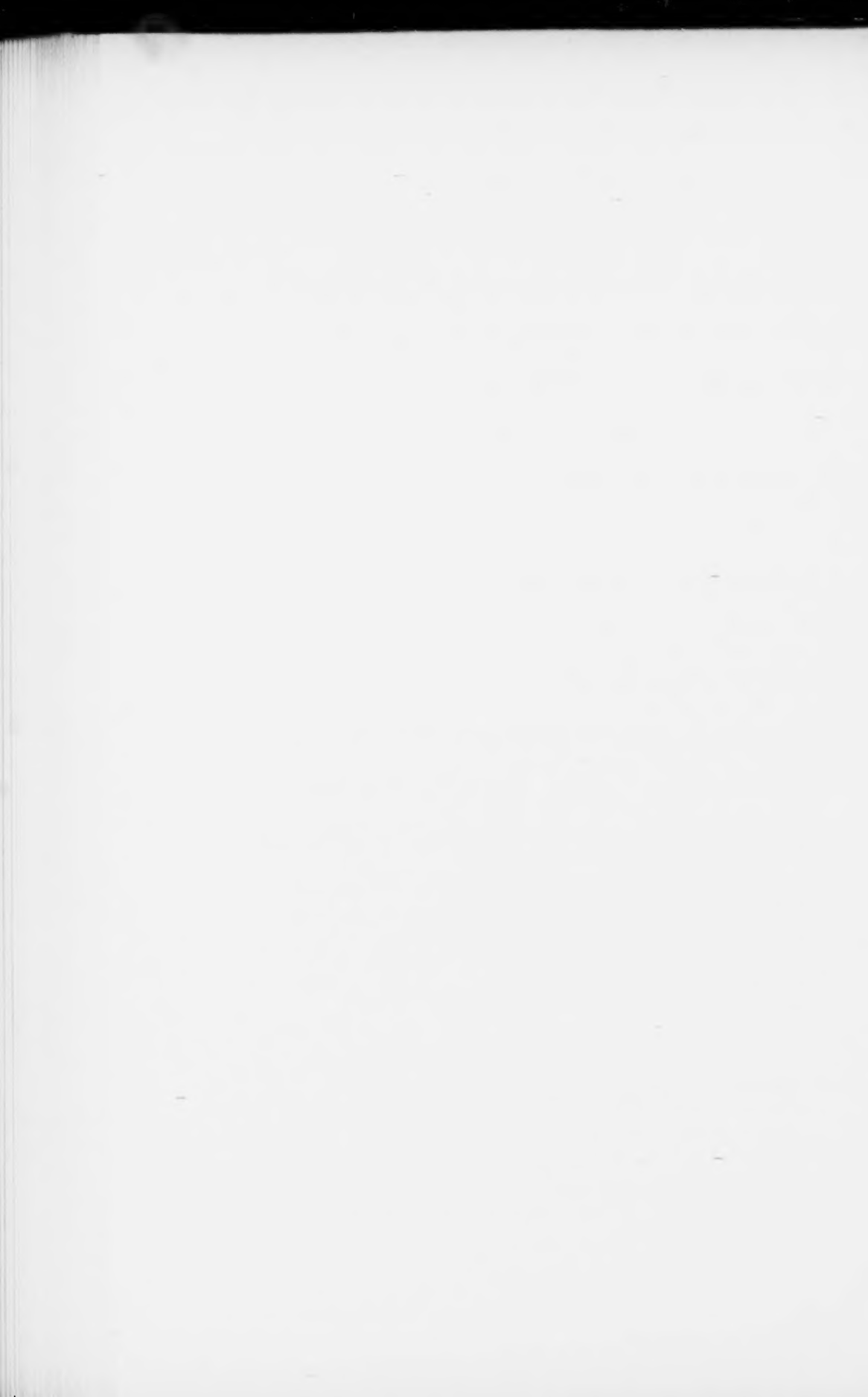
Union vs. IBP, Inc, 857 F 2d 422, (1988)

involved a Union which brought a declaratory judgment action seeking to have the provisions of a state's mass picketing statute declared unconstitutional. The Eighth Circuit, in response to the Defendant's argument that the Union did not have standing because there had been no actual or threatened injury to the picketers because no picketers had been arrested, prosecuted, or threatened with prosecution during the Union's most recent picketing activity when the Union had violated the statute, held, at 857 F 2d 422, 427, that:

"[Defendant's] argument misapprehends the nature of the injury in fact requirement [of standing]. Plaintiffs need not expose themselves to actual arrest or prosecution if they legitimately possess more than an imaginary or speculative fear of prosecution."

. . .

"Past arrest or threats of arrest, while relevant, are not necessary to establish the justiciability of Plaintiff's claims, however, and we reject defendants' contention that the lack of any previous arrest under the



communications provision precludes plaintiff's current challenge to that statute. Where plaintiffs alleged an intention to engage in a course of conduct arguably affected with a constitutional interest which is clearly prescribed by statute, courts have found standing to challenge the statute, even absent a specific threat of enforcement". (emphasis added)

Contrary to the implications in the Eleventh Circuit's decision, McCall, just as the Union picketers in the IBP case, need not expose himself to actual arrest or prosecution where he clearly and legitimately possess more than an imaginary or speculative fear of prosecution.

The Seventh Circuit in Bickman v. Lashof, 620 F 2d 1238 (1980) held that a doctor who was in prison and could not even practice medicine, still had standing to test the constitutionality of a statute regulating abortions, where the doctor alleged in his complaint that he desired to practice abortions following his release from prison. As distinguished from Bickman, McCall can and will engage in his intended



speech and there is no condition that must be fulfilled before he is able to speak in the manner in which he intends and desires.

The Fifth Circuit in Kvue, Inc. vs. Moore, 709 F 2d 922 (1983), found that a plaintiff had standing to attack the constitutionality of a Texas' statute prescribing rates which a radio and television station could charge political advertisers and requiring sponsors of such advertising to identify themselves, even though the District Attorney had determined that the statute was ambiguous and did not even anticipate prosecuting the plaintiff under the statute. Here, Birmingham will definitely prosecute McCall for his intended speech.

Therefore, there is substantial and direct conflict between the Eleventh Circuit's decision and the decisions of other Circuit Courts of Appeals.



4. THE ELEVENTH CIRCUIT'S DECISION IS IN CONFLICT WITH THAT CIRCUIT COURT'S PRIOR DECISIONS

The Eleventh Circuit, by denying McCall standing, completely disregarded the judicial precedent as established by that Court in its previous decisions. The Eleventh Circuit in Solomon v City of Gainesville, 763 F 2d 1212 (1985), and Leverett v City of Pinellas Park, 775 F 2d 1536, recognized the existence of the liberal standing rules and permitted standing under circumstances involving similar facts and law. The Eleventh Circuit's decision in this case directly conflicts with those decisions.

The Eleventh Circuit in Leverett v. City Of Pinellas Park, at 775 F 2d 1536, 1538, found that plaintiffs had standing to attack the constitutionality of a newly enacted ordinance regulating nude dancing in bars even though the plaintiffs had never been threaten with prosecution. The Eleventh



Circuit recognized and applied the liberal standing rules applicable to "freedom of speech" cases to the plaintiffs and held that the plaintiffs had standing. The Eleventh Circuit in Leverett, at 775 F 2d 1536, 1538, even condemned the District Court's reference to a decision involving non-speech conduct as a legal precedent to determine if that plaintiff had standing to assert a violation of his rights of freedom of speech. The Eleventh Circuit now commits the very same error that it condemned in Leverett, by citing its decision in Hardwick v. Bowers, which involved no statute regulating speech, as precedent for its decision in this case.

The Eleventh Circuit's decision in Solomon v. City of Gainesville, 763 F 2d 1212 (1985) provides even stronger evidence of that Circuit's conflicting positions on the standing of Plaintiffs in free speech cases. The Solomon decision is on "all fours" with



the facts in this case, with the exception that Solomon involved a statute that attempted to regulate commercial speech and a plaintiff who was seeking to engage in commercial speech which a state may constitutionally regulate to a greater extent than the non-commercial speech involved in this case. In Solomon, the plaintiff sought to challenge the constitutionality of a municipal ordinance which attempted to regulate language or written communication in display signs. After the City had warned Solomon that his business sign violated the terms of the ordinance regulating obscene, indecent or immoral speech on such signs, Solomon filed a complaint in Federal Court seeking to protect his constitutional rights of freedom of speech. The Eleventh Circuit held that Solomon had standing under the liberal standing rules applicable to free speech cases to challenge the ordinance on the



grounds of overbreadth, even though Solomon had not been arrested under the ordinance, and held that the ordinance was facially unconstitutional because of overbreadth and vagueness.

The Birmingham ordinances clearly seek to and do, under the facts in this case, regulate more constitutionally protected speech than that found in the Leverett and Solomon decisions, yet the Eleventh Circuit chose to disregard its own prior decisions and enter a judgement that blatantly conflicts with such decisions.

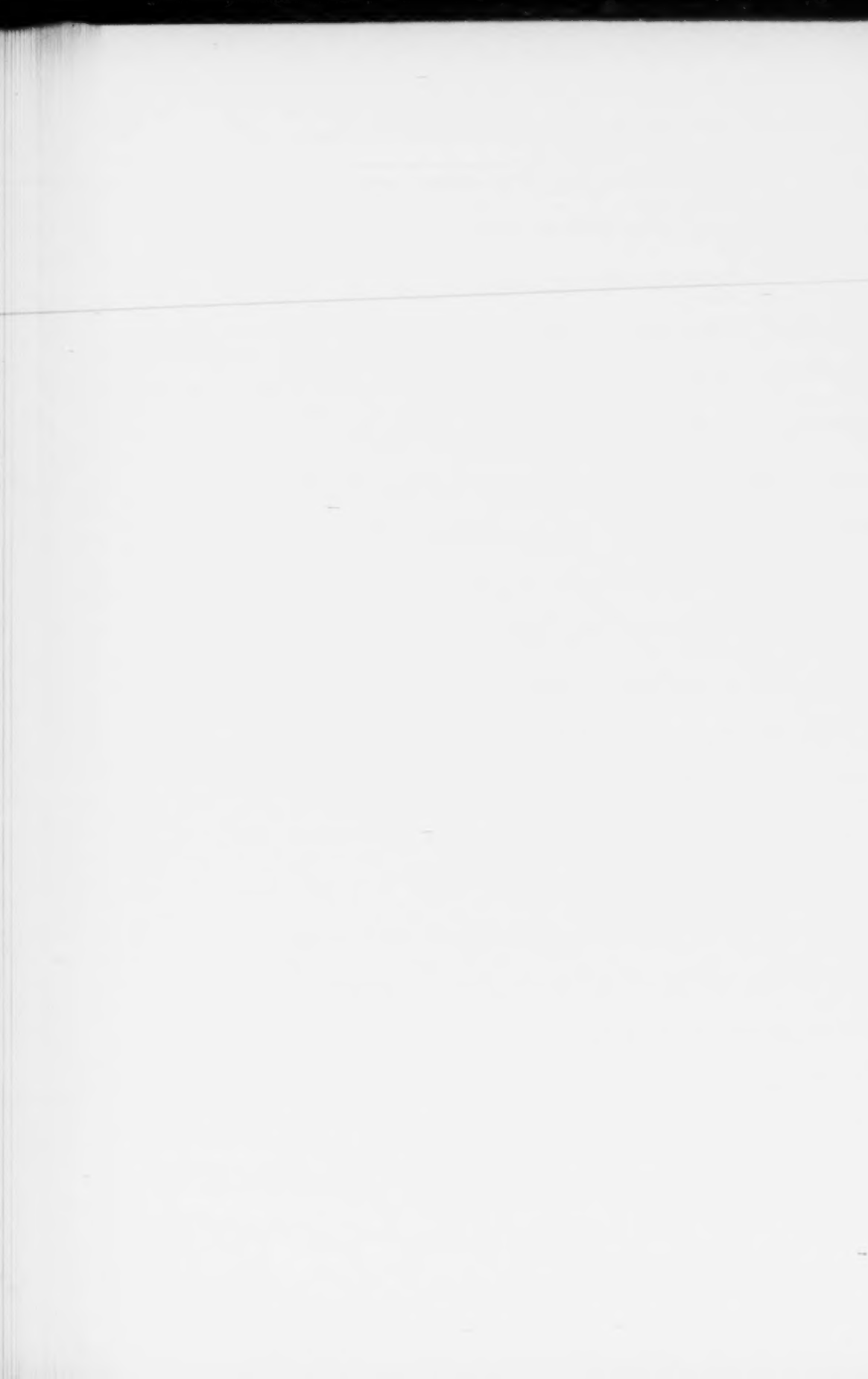
Even under the very decision that the Eleventh Circuit cited as its sole authority for its judgement that McCall did not have standing, that decision ably supports McCall's standing. In the Hardwick decision, the Eleventh Circuit found that Hardwick had standing to bring an action to declare a sodomy statute unconstitutional and that two other Plaintiffs, John and Mary Doe, did not



have such standing. The Eleventh Circuit in this case, disregarded the substantial similarity of the facts and law in the Hardwick case which supported that Court's decision concluding that Mr. Hardwick had standing, and chose instead to premise its conclusion solely on that Court's questionable decision with respect to the lack of standing of John and Mary Doe.

The facts relating to the Does in the Hardwick case lack any similarity to the basic facts in this case, since the Does failed to allege in their complaint that they faced any "risk of prosecution" and only alleged that the existence of the sodomy statute, along with the arrest of Mr. Hardwick, had "chilled and deterred" them, and had interfered with decisions regarding their personal lives.

McCall, on the other hand, is the only party-plaintiff in this action and has alleged that Birmingham will, in fact,



prosecute him under the ordinances with the additional corroborating evidence of the prior arrests of McCall's friend under the same ordinances, for the very same speech directed to the very same police officer.

The Eleventh Circuit's decision also avoided any recognition that McCall's action seeks only to secure his constitutional rights and not those of anyone else. (McCall's friend).

CONCLUSION

The issues raised in this petition are of such constitutional significance that this Court should grant the requested writ and resolve such issues. If the Eleventh Circuit's decision is not reviewed by this Court and is permitted to stand, it will restrict freedom of speech far more than any legislative enactment, in that that decision would act as authority establishing that prospective relief from laws unconstitutionally violating freedom of

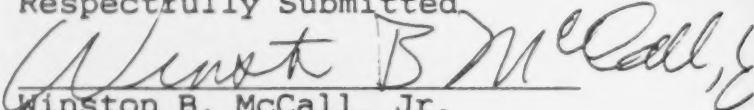
speech is no longer available and that an individual desiring to engage in speech must be prepared to suffer arrest and prosecution for such speech or forever forebear from exercising that right.

The decision of the Eleventh Circuit is not only in direct conflict with previous decisions of this Court, but also with decisions of several other Circuit Courts and with the Eleventh Circuit's own decisions.

For the reasons stated above, it is respectfully requested that this Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals be granted, and further that this Court summarily reverse that decision.

Dated: July 11, 1991

Respectfully Submitted


Winston B. McCall, Jr.
708 Frank Nelson Bldg.
Birmingham, AL 35203
(205) 322-8484
Petitioner (Pro Se)



APPENDIXES

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7432
Non-Argument Calendar

D. C. Docket No. CV-90-P-0505-S

WINSTON B. McCALL, JR.,

Plaintiff-Appellant,

versus

CITY OF BIRMINGHAM;
ARTHUR DEUTCSH, in his official
capacity as Chief of Police of
the Birmingham Police Department,

Defendants-Appellees.

Appeal from the United States
District Court for the Northern District of Alabama

(March 28, 1991)

Before FAY, BIRCH AND DUBINA, Circuit
Judges.

PER CURIAM:

The appellant in this case appeals from the district court's grant of the defendants' motions for summary judgment or in the alternative to dismiss. We affirm the judgment of the district court based upon the reasoning set forth in its opinion and order entered on May 25, 1990.

AFFIRMED.



APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

WINSTON B. MCCALL, JR.,)	
)	
Plaintiff)	
	)	Case No. CV
	)	90-p- 00505-S
-vs.-)	
)	
)	
CITY OF BIRMINGHAM, et al.,	)	Entered
	)	May 25, 1990
)	
Defendants.)	

ORDER

For the reasons stated in the accompanying opinion, defendants' Motions for Summary Judgment or in the alternative to Dismiss are GRANTED. This action is hereby DISMISSED with prejudice; costs taxed against plaintiff.

This the 25th day of May, 1990.

\Sam C. Pointer, Jr.\
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

WINSTON B. MCCALL, JR.,)	
)	
Plaintiff;)	
	)	Case No.
	)	CV 90-P-00505
-vs.-)	
)	
	)	Entered
	)	May 25, 1990
CITY OF BIRMINGHAM, et al.,)	
)	
Defendants.)	

OPINION

On March 19, 1990 plaintiff filed this action seeking a declaratory judgment that Sections 11-6-10 and 11-6-12 of the General Code of the City of Birmingham are unconstitutional and seeking an injunction precluding the city from enforcing those provisions. Plaintiff alleges that a friend of his, while under the influence of alcohol, called Birmingham police officers Edward McClung and James T. Hinkey a "son of a bitch." Plaintiff's friend was arrested

and charged with violation of the above-cited ordinances for this conduct. Plaintiff alleges that he himself would like to and will engage in the same conduct for which his friend was arrested, but has refrained from doing so for fear he will be arrested and prosecuted. All defendants have moved for summary judgment or dismissal on the grounds that plaintiff lacks standing, the court lacks jurisdiction, there is no case or controversy, and plaintiff has not stated a claim against defendants. Because plaintiff lacks standing to bring this action, defendants' Motions are due to be granted.

In order to have standing, "a plaintiff must demonstrate that he or she has suffered an actual or threatened injury caused by the challenged conduct of the defendant."

Hardwick v. Bowers, 760 F.2d 1202, 1204



(11th Cir. 1985) (citations omitted).² One indicator of threatened harm to a plaintiff comes from the nature of his interest in violating a statute. *Id.* "While a plaintiff hoping only to challenge a statute might overestimate his or her willingness to risk actual prosecution, a plaintiff who genuinely desires to engage in conduct regardless of its legal status presents a court with a more plausible threat of future prosecution." *Id.* at 1205. Thus in *Hardwick*, Michael Hardwick, a homosexual, was likely to continue to engage in sodomy and who, because he was a homosexual, was likely to continue to engage in sodomy had standing to

² The Supreme Court reversed the Eleventh Circuit's decision in *Hardwick* in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and the decision was vacated by the Eleventh Circuit. 804 F.2d 622 (1986). The Supreme Court, however, did not address the issue of standing. Furthermore, the Eleventh Circuit has cited the discussion of standing in *Hardwick* with approval. *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985).



challenge Georgia's anti-sodomy statute. John and Mary Doe, on the other hand, lacked standing. The Does were a married couple acquainted with Hardwick who alleged that they wished to engage in sexual activity proscribed by the anti-sodomy statute but were "chilled and inhibited" by the existence of the statute and the recent arrest of Hardwick. These allegations were not sufficient to show a realistic fear of prosecution.³

Plaintiff's situations more like that of the Does than that of Michael Hardwick. Plaintiff has not been arrested; he does not even allege that he has engaged in any conduct prohibited by Sections 11-6-10 and 11-6-12 in the past. Nor does plaintiff allege that the ordinances are enforced primarily against a particular class of which he is a member. Finally, there are

³ The Does did not appeal this conclusion

others, such as plaintiff's friend, who are better suited to challenge these ordinances.⁴ Thus, even if plaintiff has constitutional standing, prudential concerns dictate finding that plaintiff lacks standing. In light of this conclusion, it is unnecessary to address the remaining issues raised by defendants.

Defendants' Motions for Summary Judgment or in the alternative to Dismiss are GRANTED.

This the 25th day of May, 1990.

/Sam C. Pointer, Jr./
United States District Judge

⁴ This is not to say that plaintiff's friend necessarily has standing to bring this claim. Rather, it appears to the court that there are others, such as plaintiff's friend, who have a stronger claim to standing than does plaintiff.



APPENDIX D

No. A-933

Winston B. McCall, Jr.,

Petitioner

v.

City of Birmingham, et al.

O R D E R

UPON CONSIDERATION of the
application of the petitioner,

IT IS ORDERED that the time for
filing a petition for a writ of certiorari
in the above-entitled case, be and the same
is hereby, extended to and including July
15, 1991.

/s/ Anthony M. Kennedy
Associate Justice of the
Supreme Court of the United States

Dated this 12th day of June, 1991.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Winston B. McCall, Jr.,	:
	:
Plaintiff,	:
	:
vs.	: CIVIL ACTION #
	: CV 90-P-00505
	:
City of Birmingham, Alabama;	:
Arthur Deutch, in his	:
official capacity as	:
Chief of Police of the	:
Birmingham Police Department,	:
	:
Defendants.	:
	:

PLAINTIFF'S ORIGINAL COMPLAINT

Plaintiff institutes this civil action
against the Defendants, and alleges as
follows:

JURISDICTION

1. The subject matter jurisdiction of
this Court is asserted under Title 28 USC
§1343(3), based upon a cause of action under
Title 42 USC §1983.

GENERAL ISSUE

2. This action is brought to determine the extent, if any, to which a municipal government may constitutionally regulate speech directed to law enforcement officials, while such officials are engaged in the performance of their duties.

PARTIES TO THIS ACTION

3. The Plaintiff is a United States citizen residing in Jefferson County, Alabama.

4. The Defendant, City of Birmingham, Alabama (hereinafter referred to as "Birmingham"), is an incorporated municipality of the State of Alabama and maintains a police department which is responsible for the enforcement of the hereinafter described ordinances of Birmingham. The City of Birmingham, Alabama, is made a defendant to this action, because this action involves questions concerning

the constitutional validity of two ordinances of said City.

5. (a) The Defendant, Arthur Deutchsh, is the Chief of the Police Department of Birmingham and is made a party to this civil action in his official capacity as Chief of Police of the Birmingham Police Department.

(b) Upon information and belief, the Defendant, Arthur Deutchsh, is acting in said official capacity as Chief of Police pursuant to the authority granted to said Defendant under the General Code of the City of Birmingham, 1980 and is the principle officer in charge of the enforcement of the ordinances of the City of Birmingham and of the supervision and control of all police officers of the Birmingham Police Department in the performance of their duties as such officers, including the enforcement by such officers of the hereinafter described ordinances.



6. The Attorney General of the State of Alabama, although not being made a party to this civil action, is being served with a copy of this Complaint in accordance with the provisions of §6-6-227, Code of Alabama, 1975.

FIRST SET OF ALLEGATIONS

7. (a) Section 11-6-10 of the General Code of the City of Birmingham, Alabama, 1980 (hereinafter referred to as "Harassment Ordinance") reads as follows:

"Sec. 11-6-10 Harassment Ordinance:

(a) A person commits the offense of - Harassment if, with intent to harass, annoy or alarm another person:

(2) He directs abusive or obscene language or makes an obscene gesture towards another person.

(b) Section 11-6-12 of the General Code of the City of Birmingham, Alabama, 1980 (hereinafter referred to as "Public Intoxication Ordinance") reads as follows:

"Sec. 11-6-12 Public Intoxication

(a) A person commits the offense of public intoxication if he appears in a public place under the influence of



alcohol, narcotics or other drugs to the degree that he endangers himself or another person or property, or by boisterous and offensive conduct annoys another person in his vicinity.
(emphasis added)

8. Plaintiff intends to and will engage in the following speech upon any public sidewalk or other public forum within the City of Birmingham, Alabama:

(a) Plaintiff intends to and will call Edward McClung, while the said Edward McClung is engaging in or appears to engage in the performance of his duties as a Birmingham police officer, a "son of a bitch" because Edward McClung, while engaged in the performance of his duties as a Birmingham police officer, previously arrested a friend of Plaintiff's for a violation of the Harassment Ordinance when such friend allegedly called Edward McClung a "son of a bitch".

(b) Plaintiff intends to and will call James T. Hinkey, while the said James T. Hinkey is engaging in or appears to engage

in the performance of his duties as a Birmingham police officer, a "son of a bitch" because James T. Hinkey, while engaged in the performance of his duties as a Birmingham police officer, previously arrested a friend of Plaintiff's for a violation of the Harassment Ordinance when such friend allegedly called James T. Hinkey a "son of a bitch".

(c) Plaintiff intends to and will call any Birmingham police officer, while any such Birmingham police officer is engaging in or appears to engage in the performance of his duties as a Birmingham police officer, a "son of a bitch" because Edward McClung and James T. Hinkey, while engaged in the performance of their duties as a Birmingham police officers, previously arrested a friend of Plaintiff's for a violation of the Harassment Ordinance when such friend allegedly called Edward McClung and James T. Hinkey a "son of a bitch".

9. Plaintiff, while under the influence of alcohol, intends to and will engage in the following speech in a loud manner and upon any public sidewalk or other public forum within the City of Birmingham, Alabama:

(a) Plaintiff intends to and will call Edward McClung, while the said Edward McClung is engaging in or appears to engage in the performance of his duties as a Birmingham police officer, a "son of a bitch", because Edward McClung, while engaged in the performance of his duties as a Birmingham police officer, previously arrested a friend of Plaintiff's for a violation of the Public Intoxication Ordinance when such friend allegedly called Edward McClung a "son of a bitch".

(b) Plaintiff intends to and will call any Birmingham police officer, while said Birmingham police officer is engaging in or appears to engage in the performance of his

duties as a Birmingham police officer, a "son of a bitch", because Edward McClung, while engaged in the performance of his duties as a Birmingham police officer, previously arrested a friend of Plaintiff's for a violation of the Public Intoxication Ordinance when such friend allegedly called Edward McClung a "son of a bitch".

10. The Defendants have enforced and will continued to enforce, and to arrest and prosecute persons under the Harassment Ordinance and the Public Intoxication Ordinance, and have and will continue to do so under the facts and circumstances as set out in paragraphs 7 and 8, above.

11. Plaintiff has refrained from engaging in the acts of speech as described in paragraphs 7 and 8 above, only due of the existence of the Harassment Ordinance and Public Intoxication Ordinance and the continuing enforcement of same by the Defendants. Plaintiff has refrained from,

and will continue to refrain from engaging in each of the said acts of speech, because of Plaintiff's fear of being arrested, prosecuted and punished under the Harassment Ordinance and the Public Intoxication Ordinance, by Birmingham police officers who are under Defendants' control and supervision. But for the existence of said ordinances, Plaintiff would have engaged in said acts of speech.

12. (a) The Harassment Ordinance is unconstitutionally overboard on its face, in violation of Plaintiff's rights as granted under the First and Fourteenth Amendments of the U. S. Constitution.

(b) The Harassment Ordinance is unconstitutionally overboard as applied to Plaintiff under the circumstances as described in paragraphs 7(a), 7(b) and 7(c), above, in violation of Plaintiff's rights as granted under the First and Fourteenth Amendments of the U. S. Constitution.

(c) The Harassment Ordinance is unconstitutionally vague on its face, in violation of Plaintiff's rights as granted under the Fourteenth Amendment of the U. S. Constitution.

(d) The Harassment Ordinance is unconstitutionally vague as applied to Plaintiff under the circumstances as described in paragraphs 7(a), 7(b) and 7(c), above, in violation of Plaintiff's rights as granted under the Fourteenth Amendment of the U. S. Constitution.

13. (a) The Public Intoxication Ordinance is unconstitutionally overboard on its face, in violation of Plaintiff's rights as granted under the First and Fourteenth Amendments of the U. S. Constitution.

(b) The Public Intoxication Ordinance is unconstitutionally overboard as applied to Plaintiff under the circumstances as described in paragraphs 8(a) and 8(b), above, in violation of Plaintiff's rights as



granted under the First and Fourteenth Amendment of the U. S. Constitution.

(c) The Public Intoxication Ordinance is unconstitutionally vague on its face, in violation of Plaintiff's rights as granted under the Fourteenth Amendment of the U. S. Constitution.

(d) The Public Intoxication Ordinance is unconstitutionally vague as applied to Plaintiff under the circumstances as described in paragraphs 8(a) and 8(b), above, in violation of Plaintiff's rights as granted under the Fourteenth Amendment of the U. S. Constitution.

(e) The Public Intoxication Ordinance is unconstitutional, in violation of the "Equal Protection Clause" of the U. S. Constitution.

14. The existence of and the continued enforcement of the Harassment Ordinance and the Public Intoxication Ordinance by Defendants, has and will continue to



unconstitutionally inhibit said acts of speech by Plaintiff, and has and will deny Plaintiff those rights granted to Plaintiff under the First and Fourteenth Amendments of the United States Constitution, thereby resulting in a "chilling effect" upon the exercise by the Plaintiff of his constitutional rights of speech.

15. (a) There is and has been an immediate and direct threat of arrest and prosecution of the Plaintiff under the Harassment Ordinance and the Public Intoxication Ordinance, if Plaintiff had previously engaged in or hereafter engages in each of the above described acts of speech referred to in paragraphs 7 and 8, above. Such an arrest and prosecution would result in a real, immediate, and substantial threat to said Constitutional rights of the Plaintiff.

(b) Unless the relief hereinafter requested is granted by this Court,



Plaintiff will suffer great and immediate, irreparable injury, in that, Plaintiff will be forced to refrain from engaging in constitutionally protected speech, and Plaintiff will thereby have no adequate remedy at law to protect Plaintiff's constitutional rights.

RELIEF SOUGHT BY PLAINTIFF

Plaintiff respectfully request that this Court grant to Plaintiff the following relief:

1. (a) A declaratory judgement that the Harassment Ordinance is unconstitutionally overboard on its face, in violation of Plaintiff's rights as granted under the First and Fourteenth Amendments of the U. S. Constitution.

(b) A declaratory judgement that the Harassment Ordinance is unconstitutionally overboard as applied to Plaintiff under each of the circumstances as described in paragraphs 7(A), 7(B), and 7(C) above, in



violation of Plaintiff's rights as granted under the First and Fourteenth Amendments of the U. S. Constitution.

(c) A declaratory judgement that the Harassment Ordinance is unconstitutionally vague on its face, in violation of Plaintiff's rights as granted under the Fourteenth Amendment of the U. S. Constitution.

(d) A declaratory judgement that the Harassment Ordinance is unconstitutionally vague as applied to Plaintiff under each of the circumstances as described in paragraphs 7(A), 7(B), and 7(C) above, in violation of Plaintiff's rights as granted under the Fourteenth Amendment of the U. S. Constitution.

'2. (a) A declaratory judgement that the Public Intoxication Ordinance is unconstitutionally overboard on its face, in violation of Plaintiff's rights as granted



under the First and Fourteenth Amendments of the U. S. Constitution.

(b) A declaratory judgement that the Public Intoxication Ordinance is unconstitutionally overboard as applied to Plaintiff under each of the circumstances as described in paragraphs 8(A) and (B) above, in violation of Plaintiff's rights as granted under the First and Fourteenth Amendments of the U. S. Constitution.

(c) A declaratory judgement that the Public Intoxication Ordinance is unconstitutionally vague on its face, in violation of Plaintiff's rights as granted under the Fourteenth Amendment of the U. S. Constitution.

(d) A declaratory judgement that the Public Intoxication Ordinance is unconstitutionally vague as applied to Plaintiff under each of the circumstances as described in paragraphs 8(A) and 8(B) above, in violation of Plaintiff's rights as



granted under the Fourteenth Amendment of the U. S. Constitution.

(e) A declaratory judgement that the Public Intoxication Ordinance is unconstitutional, in violation of the "Equal Protection Clause" of the U. S. Constitution.

3. (a) A permanent injunction restraining and enjoining Defendants and all those acting under the supervision and control of, or in concert with, said Defendants from enforcing or attempting to enforce the Harassment and the Public Intoxication Ordinance.

(b) A permanent, mandatory injunction requiring the Defendant, Arthur Deutchsh, in his capacity as Chief of Police of Birmingham and his successors in office, to provide assurance that any Order entered by this Court in this civil action will be read and understood by every present and future Birmingham police officer.



4. Plaintiff request such other and further relief, legal or equitable, to which Plaintiff may be entitled.

/Winston B. McCall, Jr./
Winston B. McCall, Jr.
708 Frank Nelson Bldg.
Birmingham, Alabama 35203
(205) 322-8484
PRO SE

Serve the following named Defendants and the Attorney General at the following addresses:

City of Birmingham, Alabama
Office of the City Clerk
Birmingham City Hall
710 - 20th Street So.
Birmingham, Al 35203

Arthur Deutchsh, Chief Of Police
Office of the Chief of Police
City of Birmingham, Alabama
417 - 6th Avenue So.
Birmingham, Al 35205

Don Sieglemen, Attorney General
Office of the Attorney General of Alabama
11 South Main Street
Montgomery, Al 36130

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Winston B. McCall, Jr.,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	CIVIL ACTION NO
	:	CV 90-P 00505-S
City of Birmingham,	:	
Alabama, et al;	:	
et al.	:	
	:	
Defendants.	:	
	:	

State of Alabama)
)
Jefferson County)

AFFIDAVIT OF WINSTON B. McCALL, JR.

My name is Winston B. McCall, Jr. I am the plaintiff in the above-styled action. I am a United States citizen residing in Jefferson County, Alabama.

I have knowledge of the existence of two ordinances of the City of Birmingham, Alabama, which read, in part, as follows:

(a) Section 11-6-10 of the General Code of the City of Birmingham, Alabama, 1980



(hereinafter referred to as "Harassment Ordinance") reads as follows:

"Sec. 11-6-10 Harassment Ordinance:

(a) A person commits the offense of Harassment if, with intent to harass, annoy or alarm another person:

(2) He directs abusive or obscene language or makes an obscene gesture towards another person.

(b) Section 11-6-12 of the General Code of the City of Birmingham, Alabama, 1980

(hereinafter referred to as "Public Intoxication Ordinance") reads as follows:

"Sec. 11-6-12 Public Intoxication

(a) A person commits the offense of public intoxication if he appears in a public place under the influence of alcohol, narcotics or other drugs to the degree that he endangers himself or another person or property, or by boisterous and offensive conduct annoys another person in his vicinity.

I intend to and will engage in the following speech upon any public sidewalk or other public forum within the City of Birmingham, Alabama, upon seeking out and locating the following police officers.



I will seek out and locate Edward McClung, and I will in a "face to face" confrontation call Edward McClung, while Edward McClung is engaging in or appears to engage in the performance of his duties as a Birmingham police officer, a "son of a bitch" because Edward McClung, while engaged in the performance of his duties as a Birmingham police officer, previously arrested a friend of mine for a violation of the Harassment Ordinance when such friend allegedly called Edward McClung a "son of a bitch".

I will seek out and locate James T. Hinkey and I will in a "face to face" confrontation call James T. Hinkey, while the said James T. Hinkey is engaging in or appears to engage in the performance of his duties as a Birmingham police office, a "son of a bitch", because James T. Hinkey, while engaged in the performance of his duties as a Birmingham police officer, previously



arrested a friend of mine for a violation of the Harassment Ordinance when my friend allegedly called James T. Hinkey a "son of a bitch".

I will seek out and locate any Birmingham police officer, and I will in a "face to face" confrontation call any such police officer while any such Birmingham police officer is engaging in or appears to engage in the performance of his duties as a Birmingham police officer, a "son of a bitch" because Edward McClung and James T. Hinkey, while engaged in the performance of their duties as Birmingham police officers, previously arrested a friend of mine for a violation of the Harassment Ordinance when my friend allegedly called Edward McClung and James T. Hinkey a "son of a bitch".

Upon any public sidewalk or other public forum within the City of Birmingham, Alabama and while I am under the influence of alcohol, I will seek out and locate



Edward McClung, while the said Edward McClung is engaging or appears to engage in the performance of his duties as a Birmingham police officer and I will in a "face to face" confrontation call Edward McClung a "son of a bitch", because Edward McClung, while engaged in the performance of his duties as a Birmingham police officer, previously arrested a friend of mine for a violation of the Public Intoxication Ordinance when my friend allegedly called Edward McClung a "son of a bitch".

Upon any public sidewalk or other public forum within the City of Birmingham, Alabama and while I am under the influence of alcohol, I will seek out and locate any Birmingham police officer, while such Birmingham police officer is engaging or appears to engage in the performance of his duties as a Birmingham police officer and I will in a "face to face" confrontation call any such police officer a "son of a bitch",



because Edward McClung, while engaged in the performance of his duties as a Birmingham police officer, previously arrested a friend of mine for a violation of the Public Intoxication Ordinance when my friend allegedly called Edward McClung a "son of a bitch".

I engage in a vocation in the City of Birmingham, Alabama, and I am constantly upon the public sidewalks and other public fora in the City of Birmingham by reason of such vocation. I regularly, and on a daily basis, see police officers upon such sidewalks and other public fora while I am engaged in my vocation.

I have personal knowledge that a friend of mine was arrested pursuant to the provisions of the Harassment and Public Intoxication Ordinances for calling Edward McClung a "son of a bitch", in that I secured the release of my friend from jail on such criminal charges. I also have



personal knowledge that all such criminal charges against my friend were later dismissed by the City of Birmingham. I am also aware that the same friend of mind was arrested pursuant to the provisions of the Harassment for calling James T. Hinkey a "son of a bitch", in that I secured release of my friend from jail on such criminal charge.

I am aware that the Harassment Ordinance and the Public Intoxication Ordinance continue to be enforced by the City of Birmingham and its police department by the fact that my friend, within the previous year, has been arrested and prosecuted twice by two separate police officers on two separate occasions for calling each such police officers a "son of a bitch".

I heretofore have refrained from calling Edward McClung a "son of a bitch" during the previous times that I have seen

him and have refrained from seeking to locate him and calling him a "son of a bitch" directly to his face, because I have been and will continue to be afraid of being arrested and prosecuted under such ordinances, if I engage in such speech for such reasons.

I heretofore have refrained from calling James T. Hinkey a "son of a bitch" and have refrained from seeking to locate him and calling him a "son of a bitch" directly to his face, because I have been and will continue to be afraid of being arrested and prosecuted under such ordinances, if I engage in such speech for such reasons.

I heretofore have refrained from calling any Birmingham police officer a "son of a bitch" and have refrained from seeking to locate any such police officer and calling him a "son of a bitch" directly to his face, because I have been and will



continue to be afraid of being arrested and prosecuted under such ordinances, if I engage in such speech for such reasons.

I am intent on exercising what I deem to be my constitutional rights of freedom of speech by engaging in the above described speech, and I need to know if the I am entitled to engage in such speech under the rights granted to me under the First and Fourteenth Amendment to the U.S. Constitution, without further fear of being arrested and prosecuted under said ordinances.

/Winston B. McCall, Jr./
Winston B. McCall, Jr.

Sworn to and subscribed before me this
22nd day of May, 1990.

/Betty Lowrey McCarty/
Notary Public

My commission Expires: October 2, 1990



APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

WINSTON B. MCCALL, JR.,)	
)	
Plaintiff;)	
	)	Case No. CV
	)	90-p-00505-S
-vs.-)	
)	
	)	Entered
	)	May 25, 1990
CITY OF BIRMINGHAM, et al.,)	
)	
Defendants.)	

RELIEF FROM ORDER, PURSUANT TO
RULE 60 FRCP.

Comes your Plaintiff in the above-styled action and moves this Court, pursuant to Rule 60 FRCP, for an Order correcting the following parts of the Record which contain the following errors made by the Plaintiff through oversight.

1. On May 25, 1990, this Court entered an Order granting Defendants' motions for summary judgement or in the alternative to



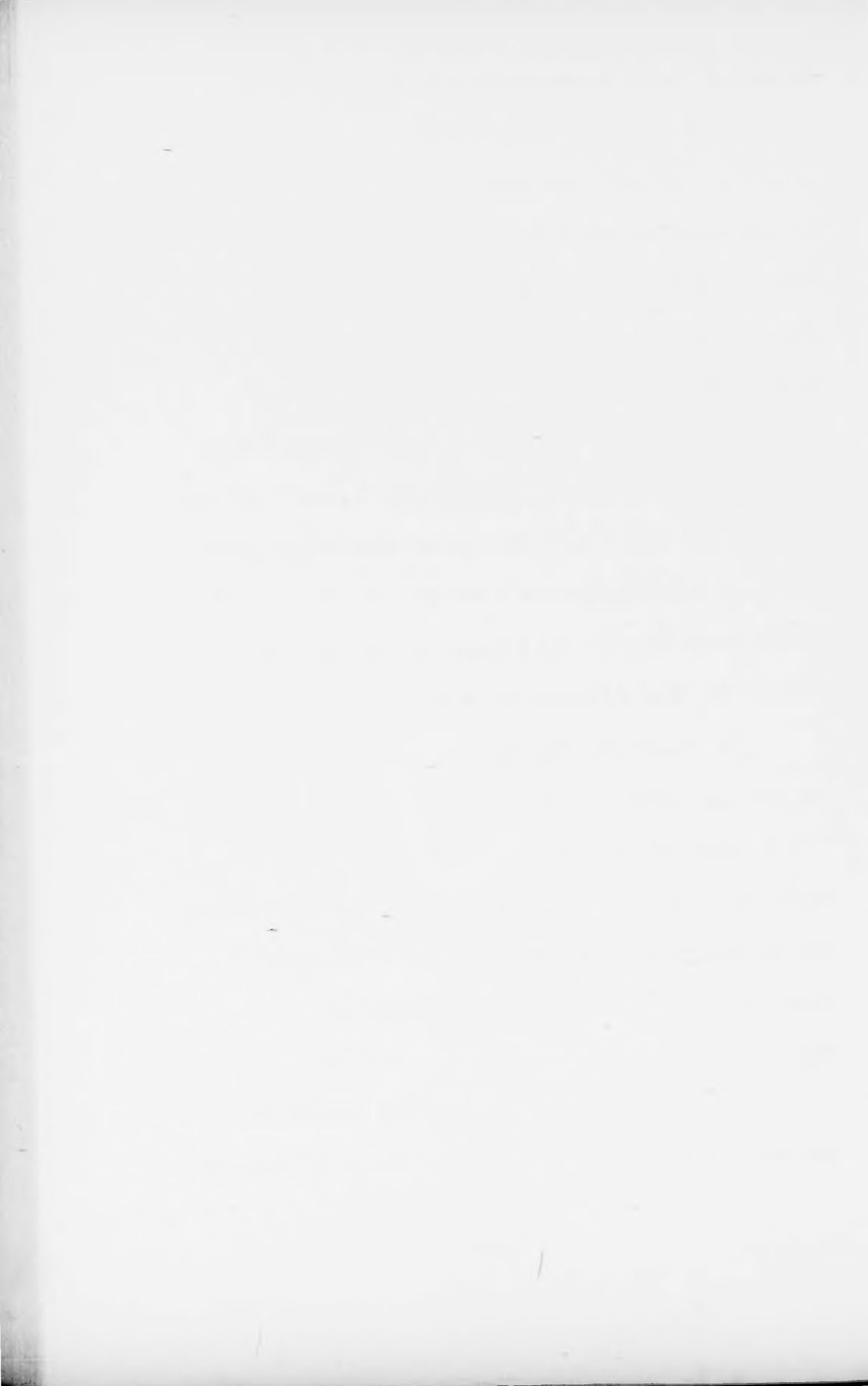
dismiss, and dismissed the action with prejudice to the Plaintiff.

2. After the entry of a said Order and after review of the Opinion of this Court, the Plaintiff has deemed it necessary to file for an appeal from said Order to the Eleventh Circuit Court of Appeals.

3. Thereafter, upon a review of all documents which would be made a part of the Record on appeal, Plaintiff has discovered various typographical errors in Plaintiff's complaint which will need to be corrected prior to the filing on any such appeal.

4. Such typographical errors are found in paragraphs 10, 11, 12(b), 12(d), 13(b), 13(d) and 15(a) of Plaintiff's complaint. Such errors are also found in the following paragraphs in the section of Plaintiff's complaint styled "RELIEF SOUGHT BY PLAINTIFF": 1(b), 1(d), 2(b), and 2(d).

5. Each of the foregoing numbered paragraphs refer to various acts of speech



as described in either paragraphs 7 and 8 of Plaintiff's complaint. Such references should have been made to either paragraphs 8 and 9 of Plaintiff's complaint.

6. Said typographical errors were inadvertently made by Plaintiff through oversight by reason of Plaintiff's use of a word-processor application program which uses paragraph numbering codes that automatically change a paragraph's number if any new paragraph is inserted above such paragraph. Plaintiff inadvertently failed to recognize such typographical errors in said paragraph numbers at the time of the filing of the complaint.

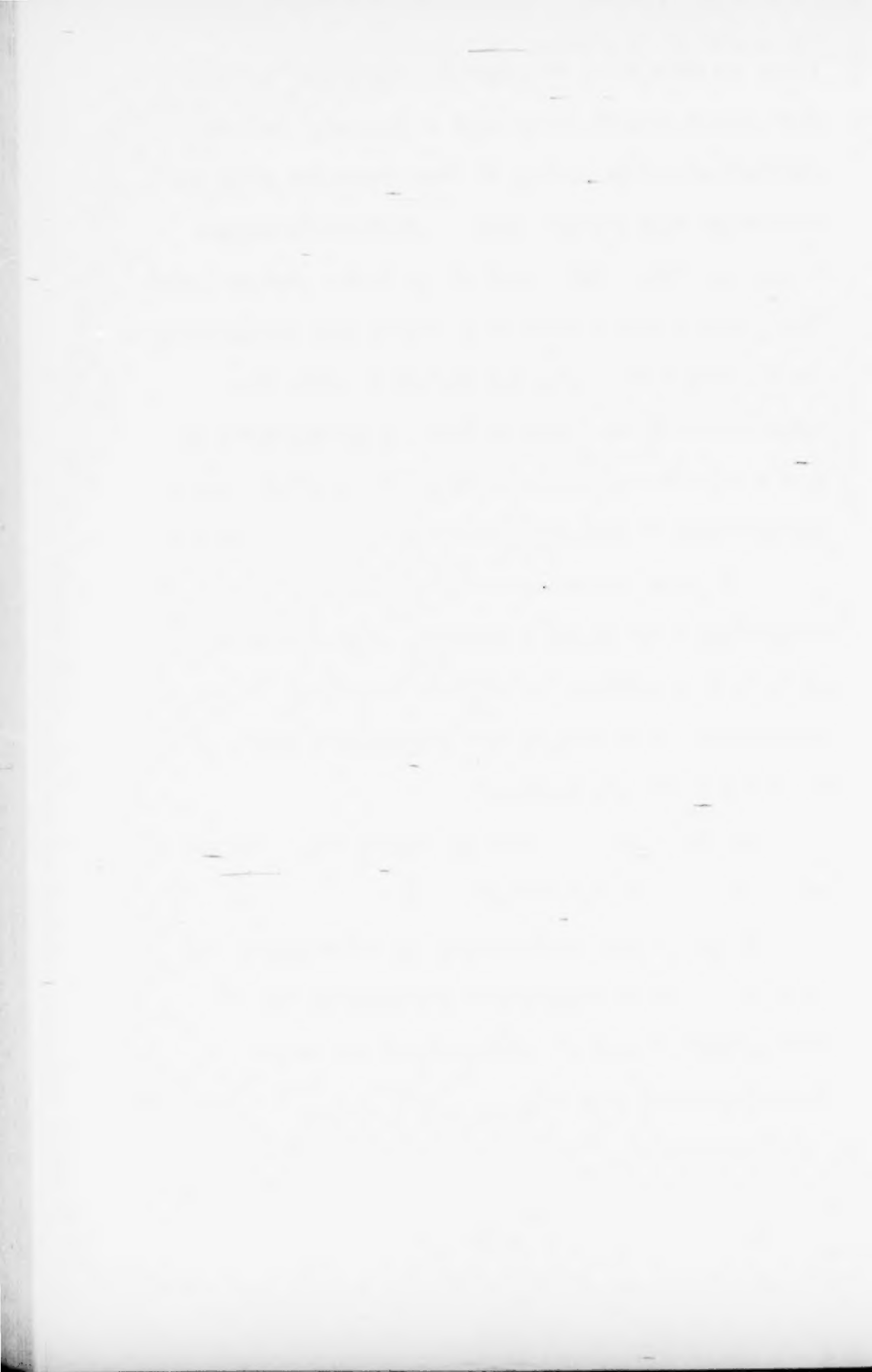
7. By reference to this Court's Order entered May 25, 1990, this Court recognized that Plaintiff in his complaint was referring to acts of speech described in paragraph 8 and 9 (rather than paragraphs 7 and 8) by this Court's reference in its Opinion to the fact that Plaintiff "would

like to and will engage in the same conduct for which his friend was arrested, but has refrained from doing so for fear he will be arrested and prosecuted". Such references clearly indicates that this Court recognized that the speech that Plaintiff was referring to in the foregoing paragraphs, was the speech which was described in paragraphs 8 and 9 of Plaintiff's complaint, rather than paragraphs 7 and 8 of Plaintiff's complaint.

8. Any chances to Plaintiff's complaint, as sought herein, are matters pertaining merely to form and not to substance, and would not prejudice any Defendant in any manner.

WHEREFORE, Plaintiff moves this Court for the following Order:

A. That any reference in paragraph 10 of Plaintiff's complaint referring to "paragraph 7 and 8" be changed to read "paragraphs 8 and 9".



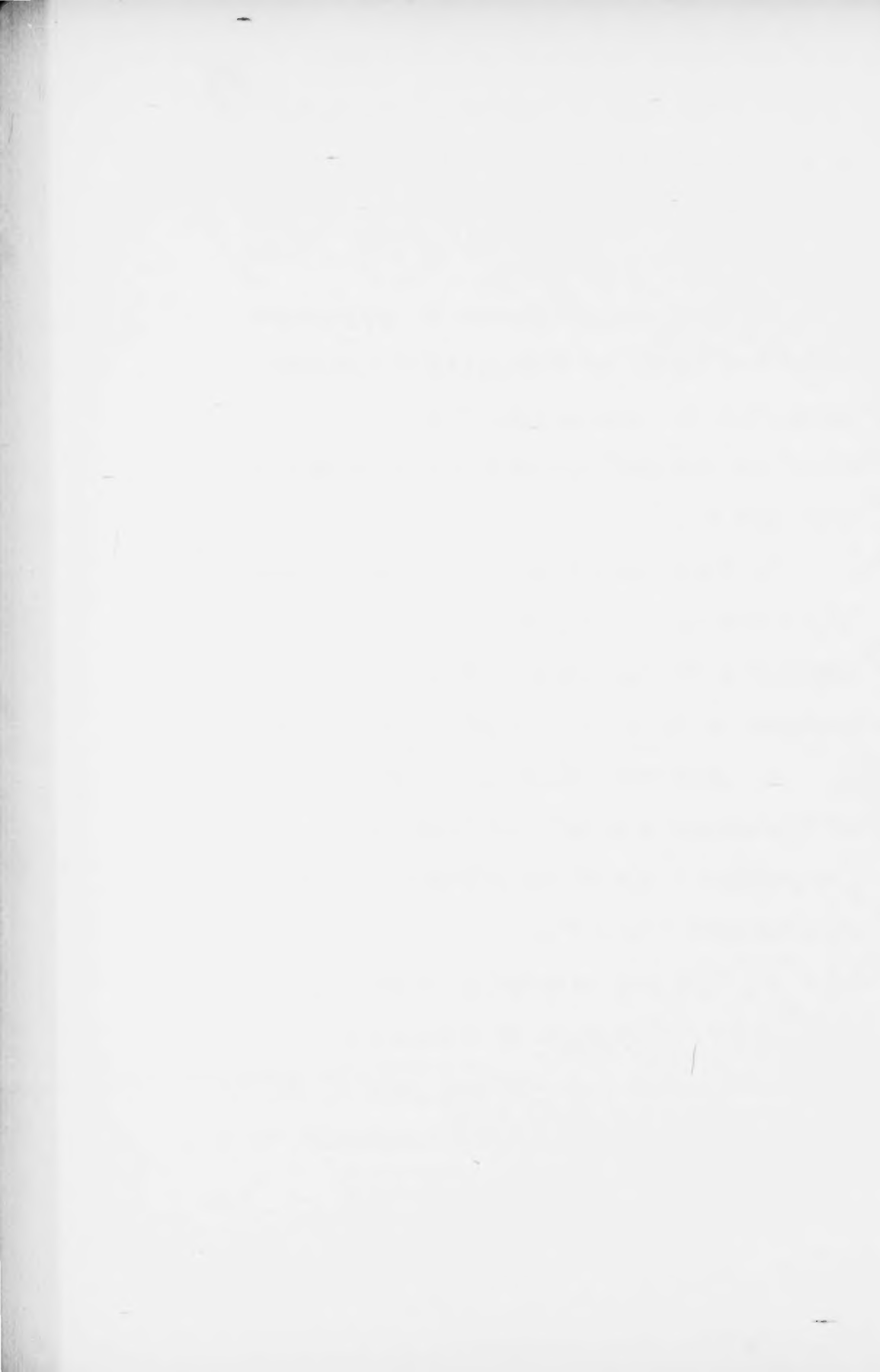
B. That any reference in paragraph 11 of Plaintiff's complaint referring to "paragraph 7 and 8" be changed to read "paragraphs 8 and 9".

C. That any reference in paragraphs 12(b) and 12(d) of Plaintiff's complaint referring to "paragraphs 7(a), 7(b) and 7(c)" be changed to read "paragraphs 8(a), 8(b) and 8(c)".

D. That any reference in paragraphs 13(b) and 13(d) of Plaintiff's complaint referring to "paragraphs 8(a) and 8(b)" be changed to read "paragraphs 9(a) and 9(b)".

E. That any reference in paragraph 15 of Plaintiff's complaint referring to "paragraph 7 and 8" be changed to read "paragraphs 8 and 9".

F. That any reference in paragraph 1(b) and 1(d) of that part of Plaintiff's complaint under the heading "RELIEF SOUGHT BY PLAINTIFF" referring to "paragraph 7(A),



7(B) and 7(C)" be changed to read
"paragraphs 8(a), 8(b) and 8(c).

G. That any reference in paragraph 2(b) and 2(d) of that part of Plaintiff's complaint under the heading "RELIEF SOUGHT BY PLAINTIFF" referring to "paragraph 8(A) and 8(B)" be changed to read "paragraphs 9(a) and 9(b)".

WHEREFORE, Plaintiff respectfully moves this Court, on its own initiative or as otherwise provided by Rule 60 FRCP, to enter an Order granting the foregoing motion of Plaintiff or to set a expedited hearing date on same within such time that Plaintiff will be able to file said Notice of Appeal within the time permitted by the Federal Rules of Appellate Procedure, with the Record as may be changed by any granting of Plaintiff's motion as requested above.

Respectfully submitted,

/Winston B. McCall, Jr./
Winston B. McCall, Jr.
708 Frank Nelson Bldg.
Birmingham, Al 35203



(205) 322-8484
Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 1990, I served a copy of the above and foregoing Motion on counsel of record for all parties to this action by mailing same by first class mail, postage prepaid, as follows:

Mr. Charles H. Wyatt. Jr.
City Attorney's Office
City of Birmingham, Alabama
600 City Hall
Birmingham, Al 35203

Of Counsel



APPENDIX G

FILED

June 6 PM 2:30
U.S. DISTRICT COURT
N.O. OF ALABAMA
C.T. CLIVER, CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

WINSTON B. MCCALL, JR.,)	
)	
Plaintiff;)	
	)	Case No.
	)	CV 90-p-00505
-vs.-)	
)	
CITY OF BIRMINGHAM, et al.,)	
)	
Defendants.)	

ENTERED
June 6, 1990

ORDER

Plaintiff's Motion for an Order
correcting part of the record is GRANTED.
After this court granted Defendants' Motions
for Summary Judgment on May 25, 1990,
plaintiff discovered certain typographical
errors in his complaint. Specifically,



certain paragraphs in the complaint refer to earlier paragraphs by incorrect numbers. The language of the complaint, however, clearly identifies the paragraphs referred to, and allowing plaintiff to correct the numerical references will not alter the meaning of the complaint or this court's determination that plaintiff lacks standing to bring this action. This requested changes are therefore allowed. Plaintiff need not file a revised complaint; the changes as described in plaintiff's Motion are deemed made.

This the 6th day of June, 1990.

/Sam C Pointer Jr./
United States District Judge

SEP 16 1991

OFFICE OF THE CLERK

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CASE NO. 91-213

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

WINSTON B. McCALL, JR.,

Petitioner,

v.

THE CITY OF BIRMINGHAM, ALABAMA,
ARTHUR DEUTCSH, in his official capacity
as Chief of Police of the
Birmingham Police Department

Respondents.

**BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

LISA HUGGINS

*Assistant City Attorney***COUNSEL OF RECORD**

CHARLES H. WYATT, JR.

Acting City Attorney

City of Birmingham

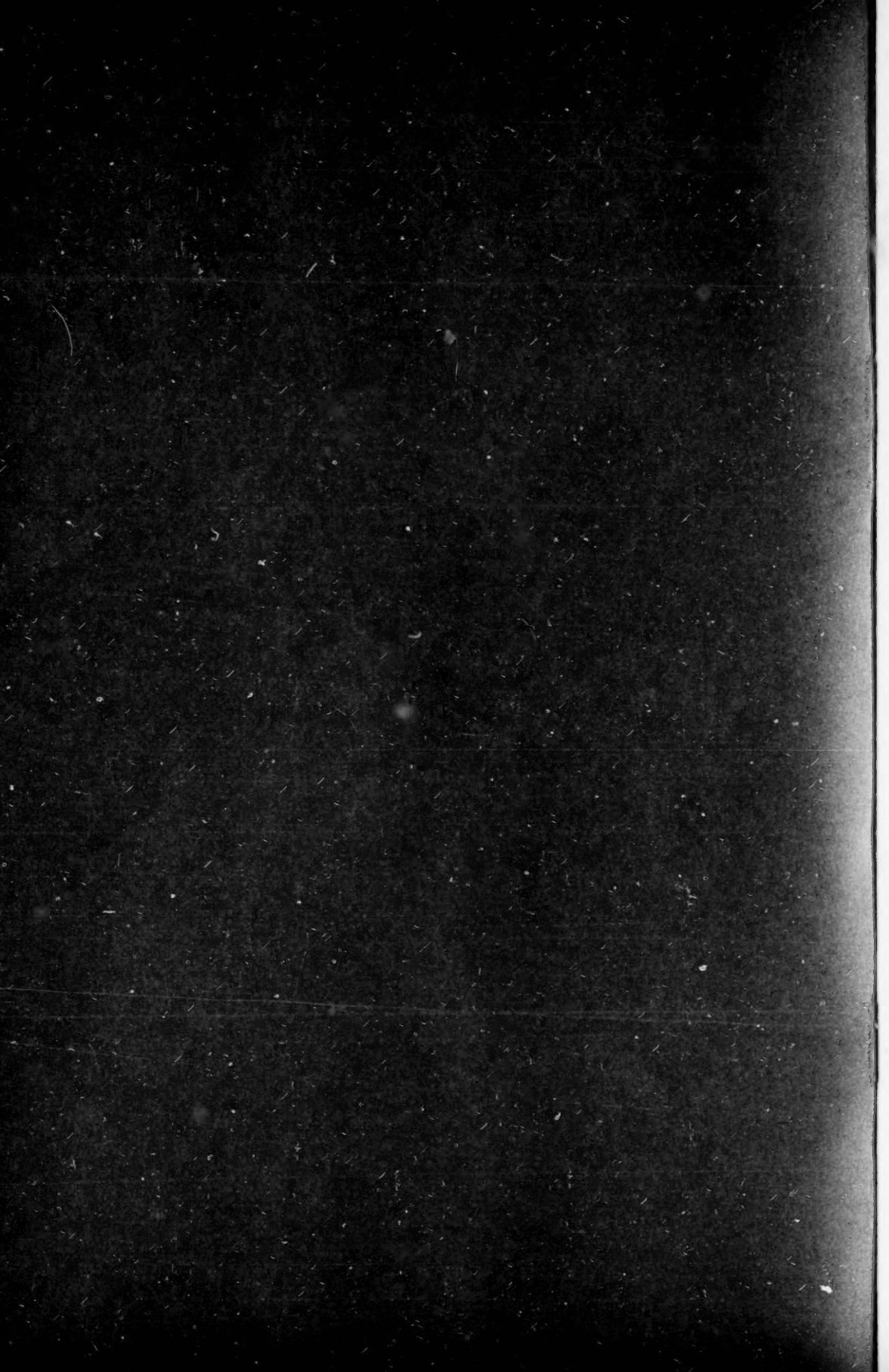
Department of Law

600 City Hall

Birmingham, Alabama 35203

(205) 254-2369

Attorneys for Respondents



QUESTION PRESENTED

Whether the record or the petition shows the existence of any ground enumerated in Supreme Court Rule 10.1 or any other valid reason for the Court to grant the Petition for Writ of Certiorari.

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STATEMENT OF THE CASE

Respondents, the City of Birmingham, Alabama (the "City") and Arthur V. Deutch ("Deutch") (collectively, the "respondents") agree with the majority of the petitioner's statement of the case. However, there are some misstatements therein of which the Court should be aware before considering the merits of the petition.

On page 7 of the Petition for Writ of Certiorari (the "petition"), the petitioner states that the District Court "indicated that its ruling [against petitioner] was pursuant to Birmingham's alternative Motion to Dismiss based upon that Court's order of dismissal and that Court's references in its opinion to McCall's failure to make certain allegations in his complaint." Respondents submit that the term "allegations" as used in the District Court's opinion refers to the allegations of the affidavit. In any event, the references to "allegations" and plaintiff's "failure to allege" certain matters are made with respect to material that appears in both plaintiff's affidavit and in the complaint.

Further, the Federal Rules of Civil Procedure provide that, once the plaintiff filed his affidavit in opposition to the City's Motion to Dismiss or, in the Alternative, for Summary Judgment, the plaintiff could not rely on his complaint. Rather, the evidence before the court acted, pursuant to F.R.Civ.P. 12(b), to convert the City's motion into one for summary judgment. F.R.Civ.P. 12(b). Whatever the petitioner intended to imply with the statement quoted from his petition, it is clear that the case was decided and reviewed in accordance with F.R.Civ.P. 56.

Also, on page 10 of the petition, petitioner states that if he engages in the speech described in his complaint and in his affidavit, "Birmingham will enforce the two ordinances and will arrest and prosecute McCall under the Harassment Ordinance and the Public Intoxication Ordinance for his intended speech. (Paragraph #10 of McCall's complaint (Appendix E, p. 76))." However, there is no evidence in the record to sup-

port this statement. There was no evidence whatsoever before the District Court of what the City would or would not do. Neither the Complaint (Petitioner's Appendix E) nor the petitioner's affidavit (Petitioner's Appendix F) contains any reference to, or evidence of, what either of the Respondents would do in the event that the petitioner engaged in the conduct described in his affidavit.

SUMMARY OF THE ARGUMENT

The respondents contend that the petition does not show any reason for the Court to hear this case. First, none of the considerations enumerated in Supreme Court Rule 10, governing the review on writ of certiorari, are present here. The petitioner's arguments that the lower courts' decisions in this case conflict with decisions from other Circuit Courts of Appeal and with decisions of this Court simply evaporate when the cited cases are read. In reality, the petitioner simply disagrees with the final outcome of the case, not the analysis of it. This is obvious from the fact that the cases with which this case purportedly "conflicts" cite the same precedents and use the same analysis as the courts that ruled against the petitioner.

Second, this case presents no issue of first impression which this Court should consider. While the petitioner makes this argument, he does not define the supposedly undecided issue to be resolved through this case.

Third, this case presents no issue or factual situation of such significance that the Court should hear it. Neither has there been any egregious miscarriage of justice in the denial of standing to this petitioner. The decisions below were made in accordance with applicable precedent from this Court, and were amply supported by the law and the record. There is no justification for their review in this Court.

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS TO JUSTIFY A GRANT OF CERTIORARI IN THIS CASE

The Eleventh Circuit's decision affirming the district court's ruling against petitioner simply adopts the district court's opinion without further comment. In turn, the district court granted summary judgment against petitioner in reliance on the Eleventh Circuit's decision in *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), *rev'd on other grounds*, 478 U.S. 186 (1986). This Court did not pass upon the Eleventh Circuit's holding that plaintiffs John and Mary Doe had no standing to challenge the statute at issue, because the Does did not appeal the Eleventh Circuit's ruling in that regard. 478 U.S. 186, 188, n.2.

Thus, for all practical purposes, the petitioner here argues that *Hardwick* is in conflict with the cases that he cites from the Fifth, Seventh and Eighth Circuits. A reading of these cases reveals that this simply isn't so, and that the Eleventh Circuit's ruling in this case is completely consistent with precedent from other circuits and from this Court.

Hardwick adhered closely to the standing rules set forth in *Steffel v. Thompson*, 415 U.S. 452 (1974), *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979) and *Younger v. Harris*, 401 U.S. 37 (1971), regarding whether the threat of the plaintiffs' prosecution under the challenged statute was "real and immediate or 'imaginary' and 'speculative.'" 760 F.2d at 1205. The standing questions in *Hardwick* were decided on a motion to dismiss and not, as here, on a motion for summary judgment. In holding that practicing homosexual Michael Hardwick had standing to challenge the sodomy statute, while the married heterosexual intervenors did not, the *Hardwick* court took into account this Court's holding in *Steffel* that, while a plaintiff need not have been individually threatened with prosecution in order to have standing, such threats may in some circumstances confer standing. *Id.* Unlike petitioner, Hardwick had been arrested under the statute he challenged.

Further, he was a member of a group which, according to his allegations, was targeted by the police for enforcement of the statute.

The Eleventh Circuit went on to deny standing to the Doe plaintiffs, relying on *Younger v. Harris*. Like the petitioner here and the intervenors in *Younger*, the Doe plaintiffs faced no "serious risk of prosecution." 760 F.2d at 1206. They did not belong to any group which was particularly likely to be prosecuted. *Id.* There was simply nothing in the record to establish an injury in fact to those plaintiffs.

Bickham v. Lashof, 620 F.2d 1238 (7th Cir. 1980) is not in conflict with *Hardwick* or with this case. Just as the *Hardwick* court found with respect to plaintiff Hardwick, the Seventh Circuit found that the imprisoned physician plaintiff in *Bickham* was the subject of a "credible threat of prosecution." 620 F.2d 1247. Both *Hardwick* and *Bickham* stand for the proposition enunciated in *Doe v. Bolton*, 410 U.S. 179, 188 (1973), that a plaintiff need not actually undergo criminal prosecution before he acquires standing to challenge a statute.

Neither does *United Food and Commercial Workers International Union v. IBP Corp.* conflict with *Hardwick* or this case. 857 F.2d 422 (8th Cir. 1988). In holding that the *IBP* plaintiffs had standing, the Eighth Circuit cited the same cases from this Court cited in *Hardwick*, and used nearly identical analysis. In both cases, the courts acknowledged that past arrests or threats thereof were relevant, but not necessary, to establish standing. 857 F.2d at 427. Both Courts explored the meaning of, and applied, this Court's holding in *Steffel* and *Babbitt* that a fear of prosecution justifying standing to sue must be more than "imaginary or speculative." 857 F.2d at 427, citing *Babbitt*, 442 U.S. at 298 and *Steffel*, 415 U.S. at 459.

Unlike the petitioner, the plaintiffs in *IBP* who were found to have standing suffering the same real threat of prosecution as the homosexual plaintiff in *Hardwick*. In *IBP*,

the county attorney [had] indicated clearly to the [union] his authority to enforce the picketing laws and acted throughout the union's strike against IBP to curtail the union's picketing activities . . . [A union official] testified that but for the existence of the . . . statutes . . . and the county attorney's statements . . . the union would have had more people picketing.

857 F.2d at 427. This does not contradict the reasoning or holding of either *Hardwick* or this case in any wise.

Finally, the plaintiff's claim that the Eleventh Circuit's decision contradicts *KVUE v. Austin Broadcasting Corp.*, 709 F.2d 922 (5th Cir. 1983), *aff'd*, 465 U.S. 1092 (1984) is similarly unfounded. The *KVUE* court found that the plaintiff there was subject to a threat of prosecution somewhere between that shown in *Steffel* and that found in *Younger*. 709 F.2d 930. However, in addition to the threat-of-prosecution testimony, there was evidence that the television station had suffered monetary loss as a result of obeying the law. Again, *KVUE* used the same analysis as *Hardwick*, and the *KVUE* station was found to have a claim to standing more like *Hardwick's* than that of the *Does*, due to the difference in the threat of prosecution and the history of the plaintiff's experience with the particular law in question.

II. THE LOWER COURTS' DECISIONS ARE NOT IN CONFLICT WITH DECISIONS OF THIS COURT

The basis for the Article III standing requirement is that the federal courts must determine whether the plaintiff at bar is the proper party to seek judicial resolution of an issue. *Flast v. Cohen*, 392 U.S. 83, 90-100 (1968). In this case, the lower courts applied the law as enunciated by this court to find that petitioner is not the appropriate party to bring this action. Both the district court and the Eleventh Circuit analyzed this case, in all respects, consistently with the constitutional and common law as decided by this Court. Therefore, there is no basis for the petitioner's argument that the lower courts' deci-

sions are inconsistent with Supreme Court precedent. *See* Supreme Court Rule 10.1(c).

Petitioner claims first that he meets this Court's requirements for standing in any case, and that the lower courts' rulings conflict with this Court's holdings in that regard. Alternatively, petitioner disputes the lower courts' rulings on the ground that his First Amendment challenge to the City's ordinances entitle him to a more expansive reading of the usual standing requirements; indeed, he seems to say that he need not be injured as long as he bases his challenge on First Amendment grounds. However, petitioner's arguments misconstrue this Court's applicable holdings because they do not take into account the type of statutory challenge at issue here.

In *Broadrick v. Oklahoma*, this Court acknowledged that there is some "departure from traditional rules of standing in the First Amendment area." 413 U.S. 601, 613 (1973). This, however, is only true where the challenger raises a claim of facial overbreadth, as opposed to a claim that the statute or ordinance is unconstitutional as applied. *See Broadrick*, 413 U.S. at 612-613. Further, the doctrine of facial overbreadth is not invoked where the ordinance or statute is subject to a limiting construction. *Id.* at 613. Where the challenge is not based on facial overbreadth, the challenger must meet the traditional rules of standing, as litigants "will not be heard to challenge [a statute] on the grounds that it *may conceivably be applied unconstitutionally to others, in other situations not before the court.*" *Broadrick*, 413 U.S. at 610, 93 S.Ct. at 2915 (emphasis added).

This is the problem with petitioner's argument. Though his complaint and his petition allege that the ordinances challenged are "unconstitutionally overbroad and vague on their face and as applied" (petition, page 6), he has not, and cannot, presented any cogent argument as to how the ordinances are overly broad on their face, or "seek to regulate 'only spoken words'." 413 U.S. at 612, *quoting Gooding v. Wilson*, 405 U.S. 518, 520 (1972). Clearly, the ordinances at issue regulate conduct, and are not subject to a facial overbreadth challenge.

See Petitioner's Appendix E, page 78 (partial text of ordinances). Petitioner was not entitled to have the lower courts relax the rules of standing for him because he cannot show that the ordinances, which are not content-based, are *prima facie* violative of the First Amendment.

Furthermore, there is no evidence in the record that the ordinances have been or will be unconstitutionally applied to the Petitioner. His evidence of the alleged future application of the ordinance is purely speculative and does not raise an instance of actual, or imminently threatened, injury to petitioner. *Cf. Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Cantwell convicted of common-law breach of the peace) and *Edwards v. South Carolina*, 372 U.S. 229 (1963) (involving statutory breach-of-the-peace convictions). The Petitioner's statement that his friend was arrested under the ordinances is not evidence of unconstitutional application, as there is nothing in the record to indicate the circumstances of that arrest. Nothing in the record suggests any connection between the arrest of petitioner's unnamed friend and an imminent threat of prosecution to the petitioner.

When traditional standing rules were applied to the petitioner in the lower courts, both the evaluation of his standing and results thereof were consonant with this Court's holdings. Petitioner presented nothing more than an allegation of future injury that was conjectural rather than actual or imminent. *See Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983). On the City's motion for summary judgment in the district court, he never presented evidence of any injury that was "concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, ___ U.S. ___, 110 S.Ct. 1717, 1723 (1990). Further, as the *Whitmore* Court noted, the federal courts cannot create Article III jurisdiction by "embellish[ing] otherwise deficient allegations of standing." *Id.* Nothing in the decisions of the lower courts conflicted in any way with these limitations on standing.

The district judge found that, even if the petitioner had arguably sustained some injury in fact, prudential considerations dictated that the petitioner be denied standing.

Petitioner's Appendix C, p. 74. Prudential considerations that bear on the question of standing include:

- (1) Whether the plaintiff asserts his own legal rights and interests as opposed to those of third parties;
- (2) Whether the adjudication would result in the decision of an abstract question amounting to a generalized grievance; and
- (3) Whether the plaintiff's complaint falls within the zone of interest protected by the statute or constitutional provision in question.

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 475 (1982). The *Valley Forge* Court made it clear that, even if a plaintiff meets all of the listed prudential requirements, he must still meet Article III's threshold standing requirement of showing a "distinct and palpable injury." *Id.*, quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) and *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Here, the district court and, by adoption, the Court of Appeals first found that the petitioner did not have a real or threatened injury of such distinct and palpable nature that he possessed standing to challenge the ordinances at issue. Then, as alternative ground for the decision, the Court found that the prudential considerations circumscribing the standing requirement indicated that the plaintiff's claim did not meet the letter or spirit of Article III of the Constitution. The decision that plaintiff was not well-suited to challenge these laws is completely consistent with *Valley Forge* and *Warth v. Seldin*.

Petitioner's complaint is arguably within the zone of interest protected by the portions of the First Amendment that he invokes. However, analysis of his claim in light of the other two facets of the prudential limitations of judicial review reveals the transparency of his Article III status and, accordingly, the propriety of the lower courts' decisions.

The fact that petitioner relies on the experience of his friend who was allegedly arrested under the challenged ordi-

nances, taken together with the fact that petitioner has never been arrested, is an unmistakable signal of an effort to assert rights of third parties, or *jus tertii*. Petitioner is doing nothing more than asserting a claim that, for whatever reason, his friend could not or would not bring. Petitioner himself has suffered no actual or threatened application of the ordinances at issue, and there is no evidence in the record that any City official has ever expressed the intent to arrest *him* under the circumstances described in his affidavit. Therefore, he has not asserted any threatened violation of his own rights, but only those of others.

As to the second prudential consideration, the petitioner's claim also necessarily failed. Because of the absence of any personal experience whatsoever with the challenged City ordinances, petitioner is asserting a generalized grievance in that he has merely dreamed up an instance in which he might be arrested and filed the written version of it in federal court. On this petition, it is dramatically evident that none of the cases cited in petitioner's brief as being contrary to the decision in this case contain any such assertion. All of the petitioners in the other cases, including *United States v. SCRAP*, set forth particular ways in which they were injured by the challenged statutes. See *United States v. SCRAP*, 412 U.S. 669 (1973); *Whitmore*, 110 S.Ct. at 1725 (analysis of standing in *SCRAP* "surely went to the very outer limit of the law."). Petitioner's claim of standing was too attenuated for the lower courts to rule otherwise because, as the *Whitmore* Court noted, "[i]t is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case." *Id.*

III. THE LOWER COURTS PROPERLY APPLIED THE SETTLED LAW OF STANDING TO THIS CASE

The petitioner does not raise any claim of any significance which could justify the Court's time in hearing this case. As stated in greater detail in part II herein, the law in this area insofar as it would apply to petitioner's case is well settled;

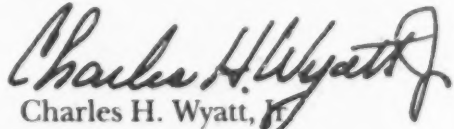
there is no need for the Court to further explain the standing requirements for cases of this type. There is clearly no conflict between the Circuits or with this Court's prior decisions which warrants a hearing. Further, there is no issue presented by the petitioner's case which has not been, but should be, decided by this Court.

Finally, the petitioner has not pointed to any greater social harm done by the ordinances at issue. There is no evidence in the record that the ordinances, which clearly regulate unlawful conduct and not pure speech, have any "chilling effect" on the exercise of First Amendment rights by the citizens of Birmingham. Certainly, there is no reason to grant certiorari in the absence of new issues to be decided or even evidence to support a contrary decision.

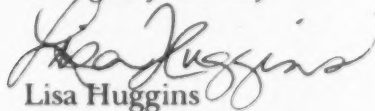
CONCLUSION

For the reasons stated herein, the respondents, the City of Birmingham, Alabama and Arthur V. Deutsch, respectfully request that this honorable Court deny the petition for writ of certiorari.

Respectfully submitted,



Charles H. Wyatt, Jr.
Acting City Attorney



Lisa Huggins
*Assistant City Attorney and
Counsel of Record*

City of Birmingham
Law Department
600 City Hall
Birmingham, Alabama 35203
(205) 254-2369

(2)

CASE NO: 91-213

Supreme Court, U.S.

FILED

OCT 8 1991

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

Winston B. McCall, Jr.,

PETITIONER,

v.

City of Birmingham, Alabama;
Arthur Deutch, in his official capacity
as Chief of Police of the
Birmingham Police Department,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO
RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Winston B. McCall, Jr.
708 Frank Nelson Bldg
Birmingham, Alabama 35203
(205) 322-8484
PRO SE

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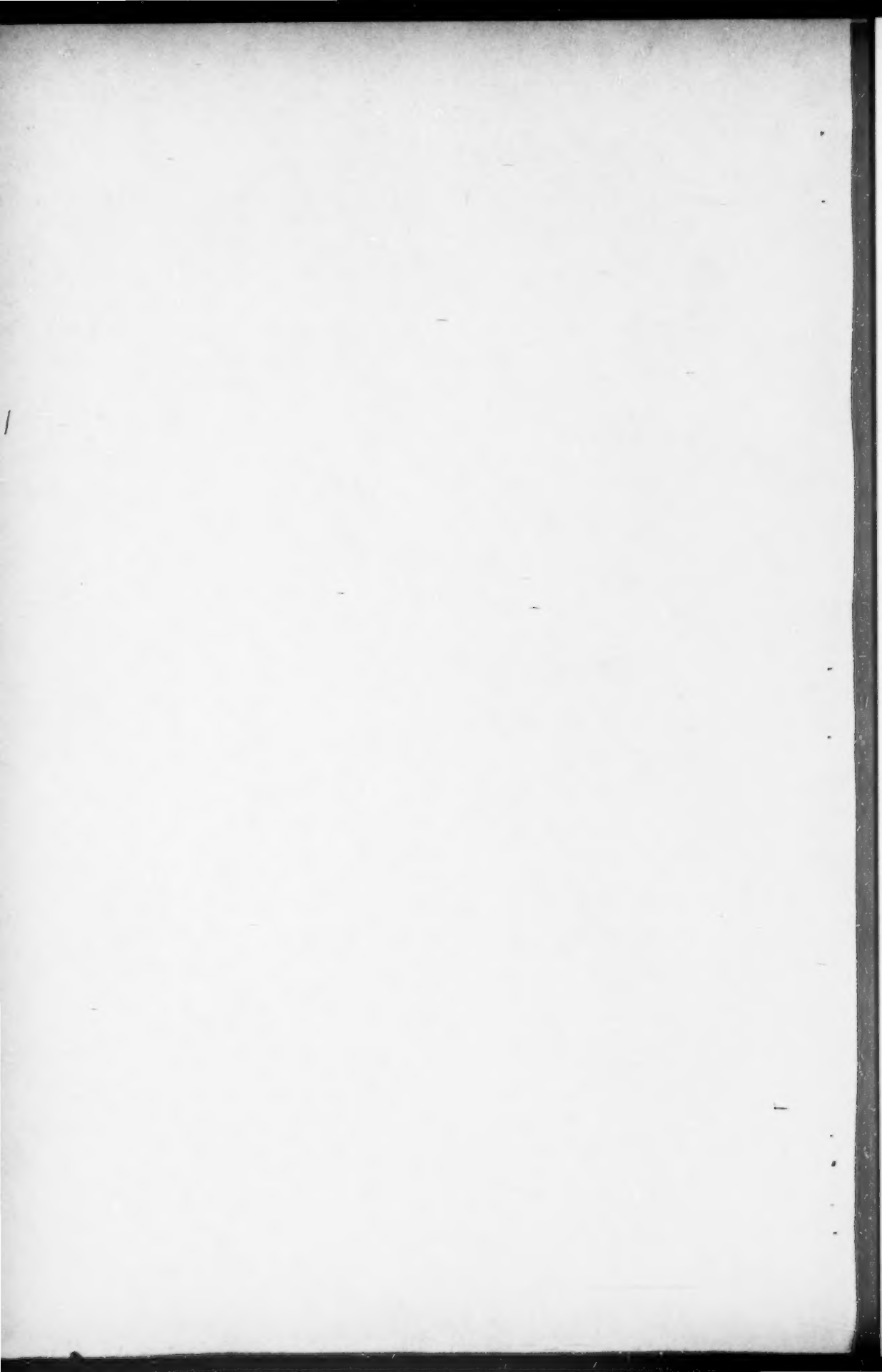


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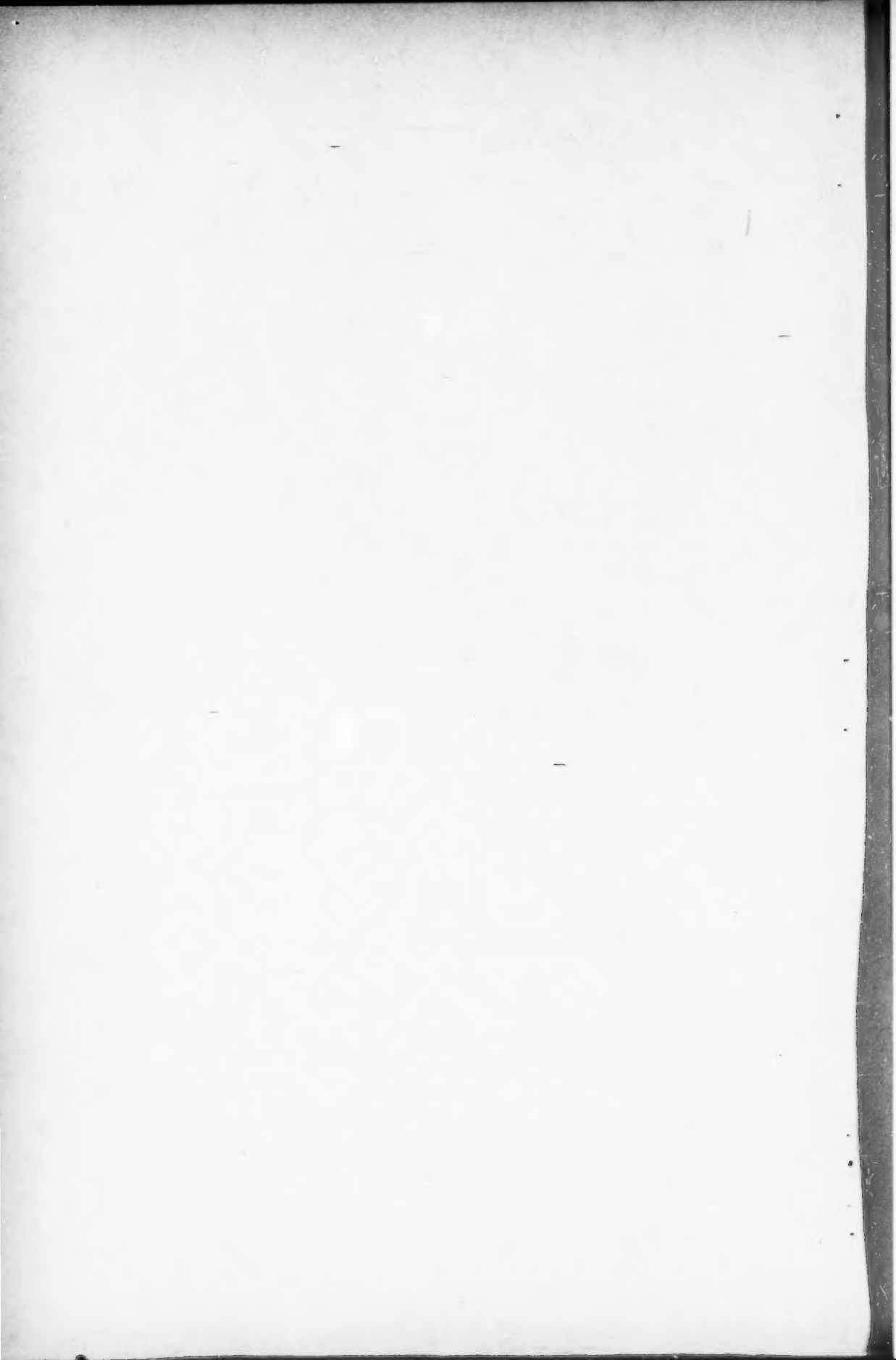
Whitmore vs. Arkansas,
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CIRCUIT COURT DECISIONS

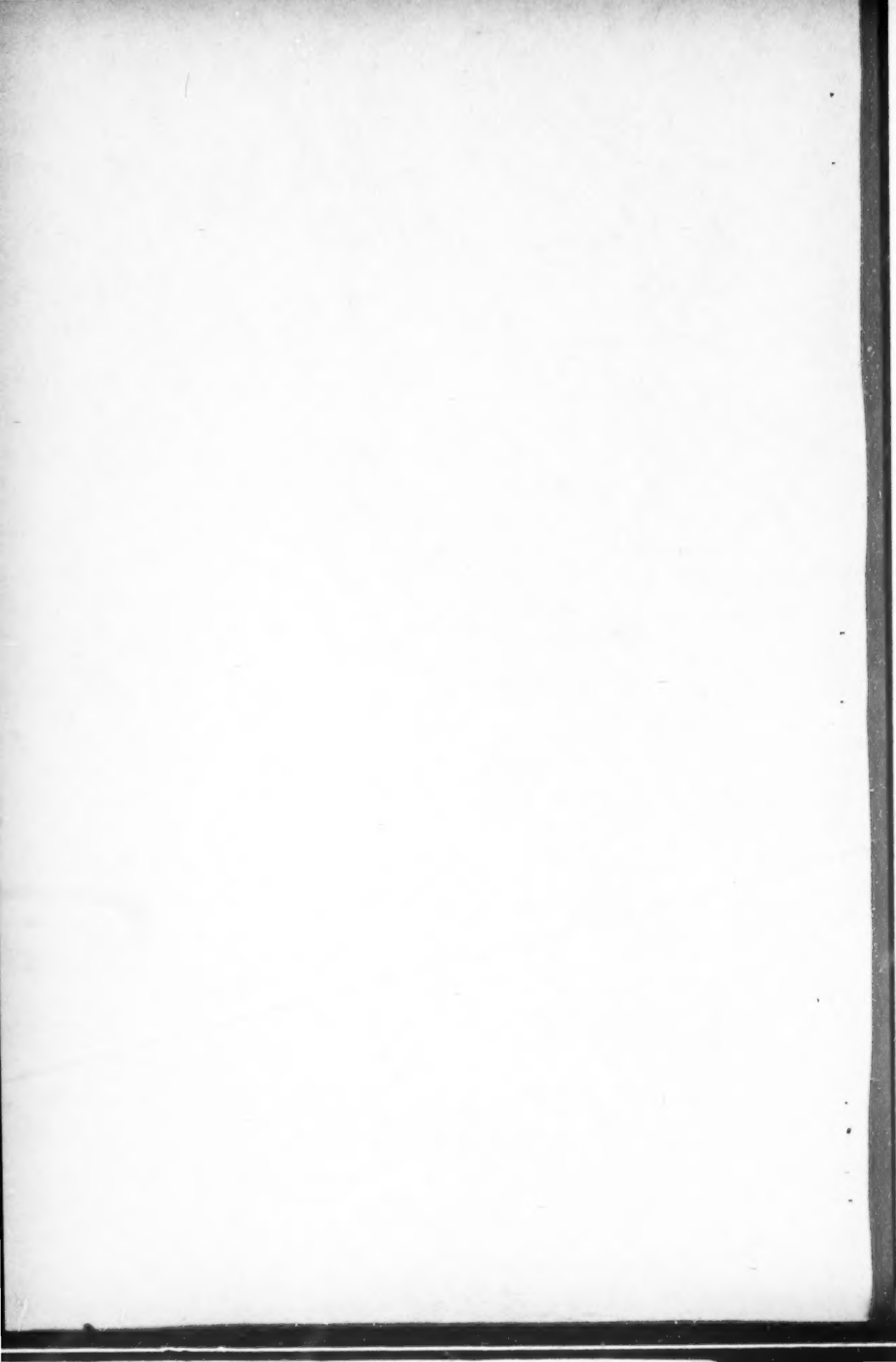
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

Winston B. McCall, Jr.,

PETITIONER,

v.

City of Birmingham, Alabama:
Arthur Deutch, in his official capacity
as Chief of Police of the
Birmingham Police Department

RESPONDENTS.

REPLY TO RESPONDENTS' BRIEF
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

Petitioner, Winston B. McCall,
Jr., (hereinafter referred to as "McCall"),
pursuant to Rule 15.6 of the Supreme Court
Rules files this brief in reply to
Respondents' brief in opposition to McCall's
Petition for a Writ of Certiorari. The
Respondents, City of Birmingham, Alabama,
and Arthur Deutch, in his official capacity
as Chief of Police of the Birmingham Police

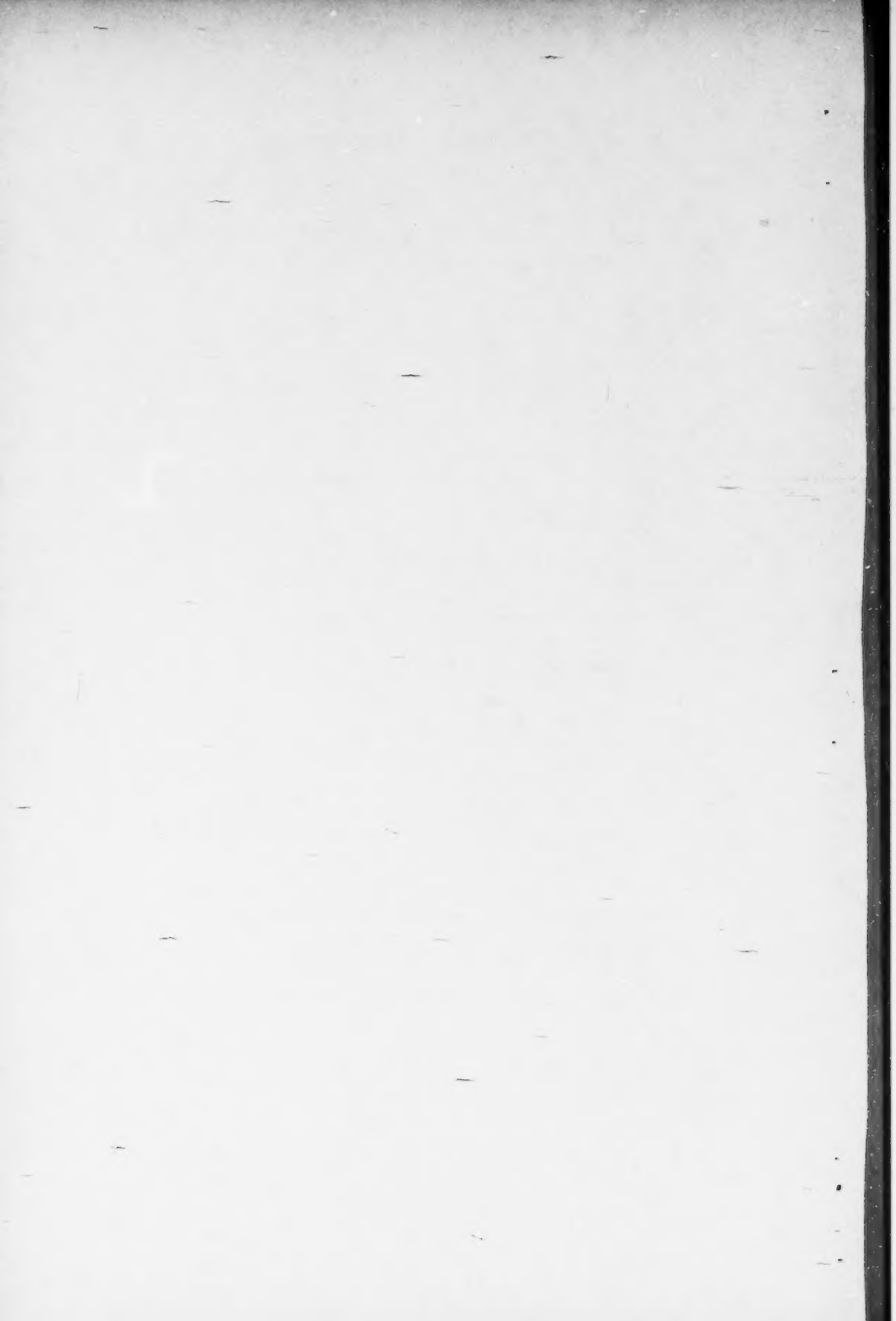


Department, are hereinafter referred to collectively as "Birmingham".

ARGUMENT

1. Birmingham, in its brief on pages 6, 7, and 10, made blatantly false assertions that the Birmingham ordinances do not regulate speech and are not content-based. A reference to the terms and context of each of the ordinances proves such an assertion to be linguistic blindness. Also, not only have the ordinances been previously applied to pure speech, as described by McCall in his complaint and affidavit, but Birmingham's assertion that the ordinances regulate conduct and not speech contradicts Birmingham's previous interpretation of those ordinances, as found on page 14 of Birmingham's brief filed in the Eleventh Circuit, where Birmingham stated:

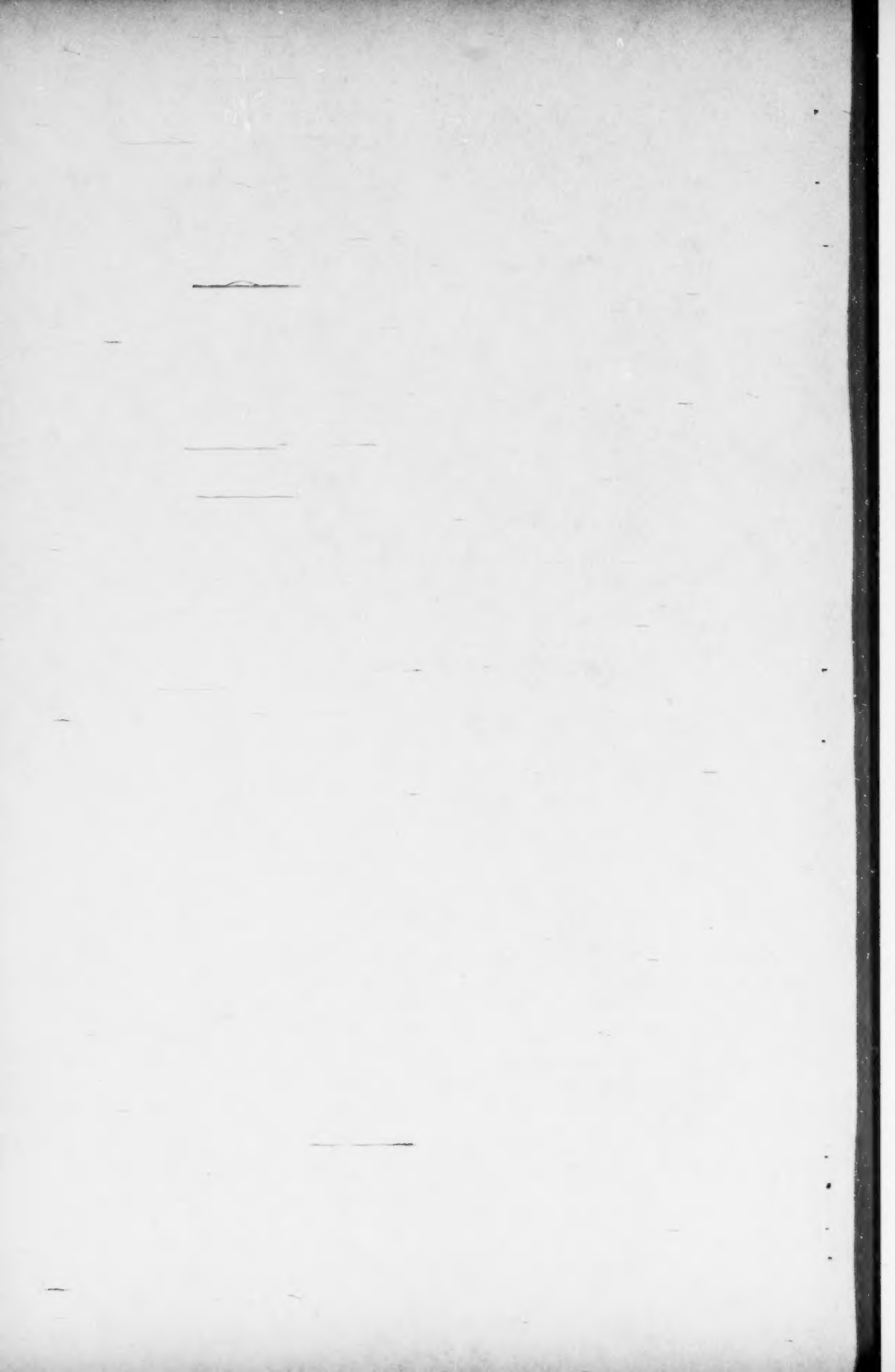
" The expressive conduct that the ordinance seeks to regulate is abusive or obscene language or obscene gestures but only if made with the intent to harass, annoy, or alarm another person.



. . .
"However, it is possible to view this ordinance as susceptible to an overbreadth challenge if harassment, as the ordinance defines it, is not seen as harmful, constitutionally protected conduct." (emphasis added)

The operative facts in this case involve only acts of pure speech by McCall and two ordinances which not only regulate only speech, but have a history, as evidenced in the record, of regulating the exact same speech that McCall will engage in.

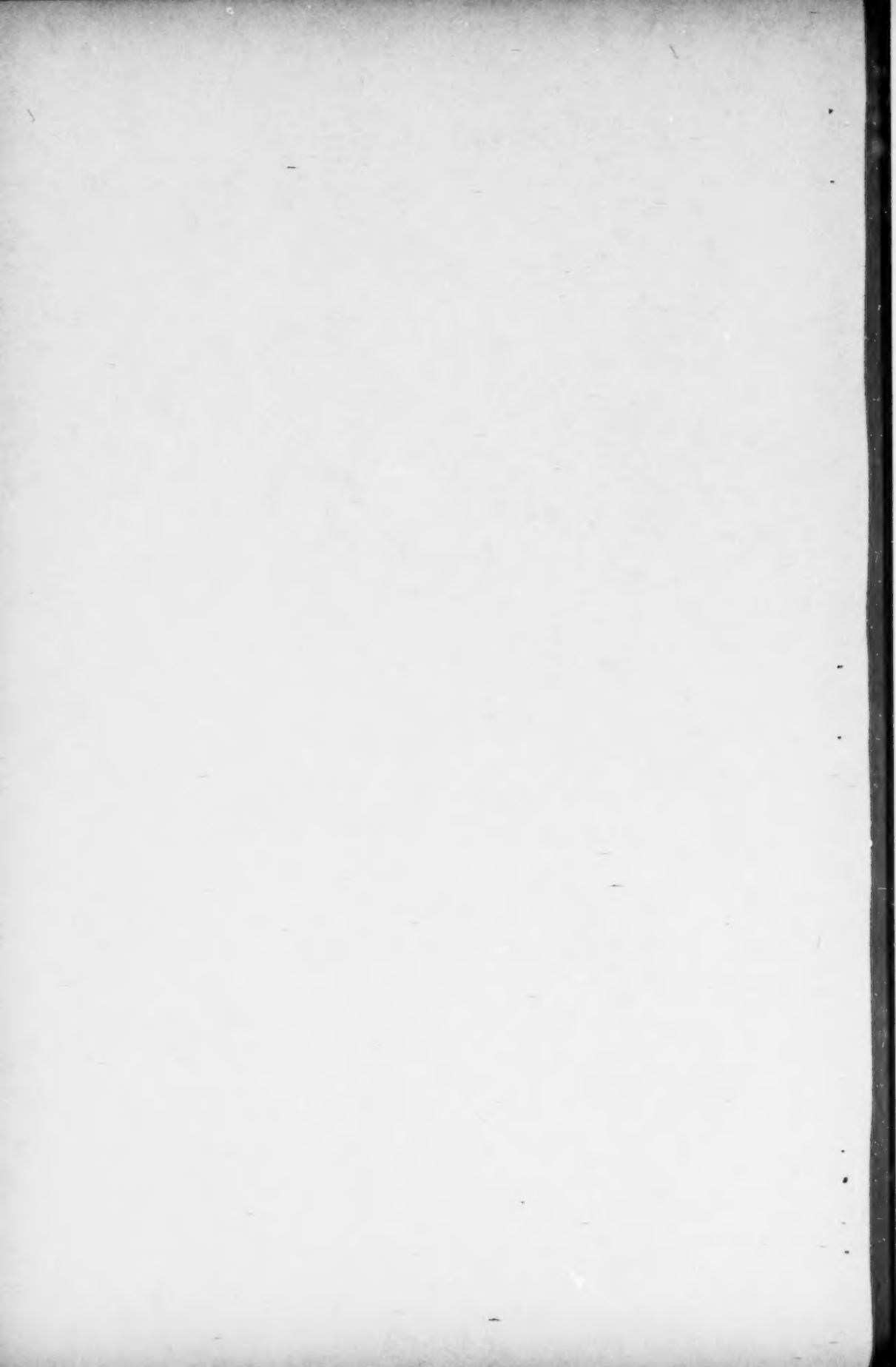
2. Birmingham, in its "Statement of the Case", for the first time during the appeal process, disputed matters which Birmingham was deemed to have admitted through Birmingham's silence on appeal to the Eleventh Circuit. At all times, while this case was pending on appeal to the Eleventh Circuit, McCall contended that the District Court entered its order pursuant to Birmingham's motion to dismiss. Birmingham



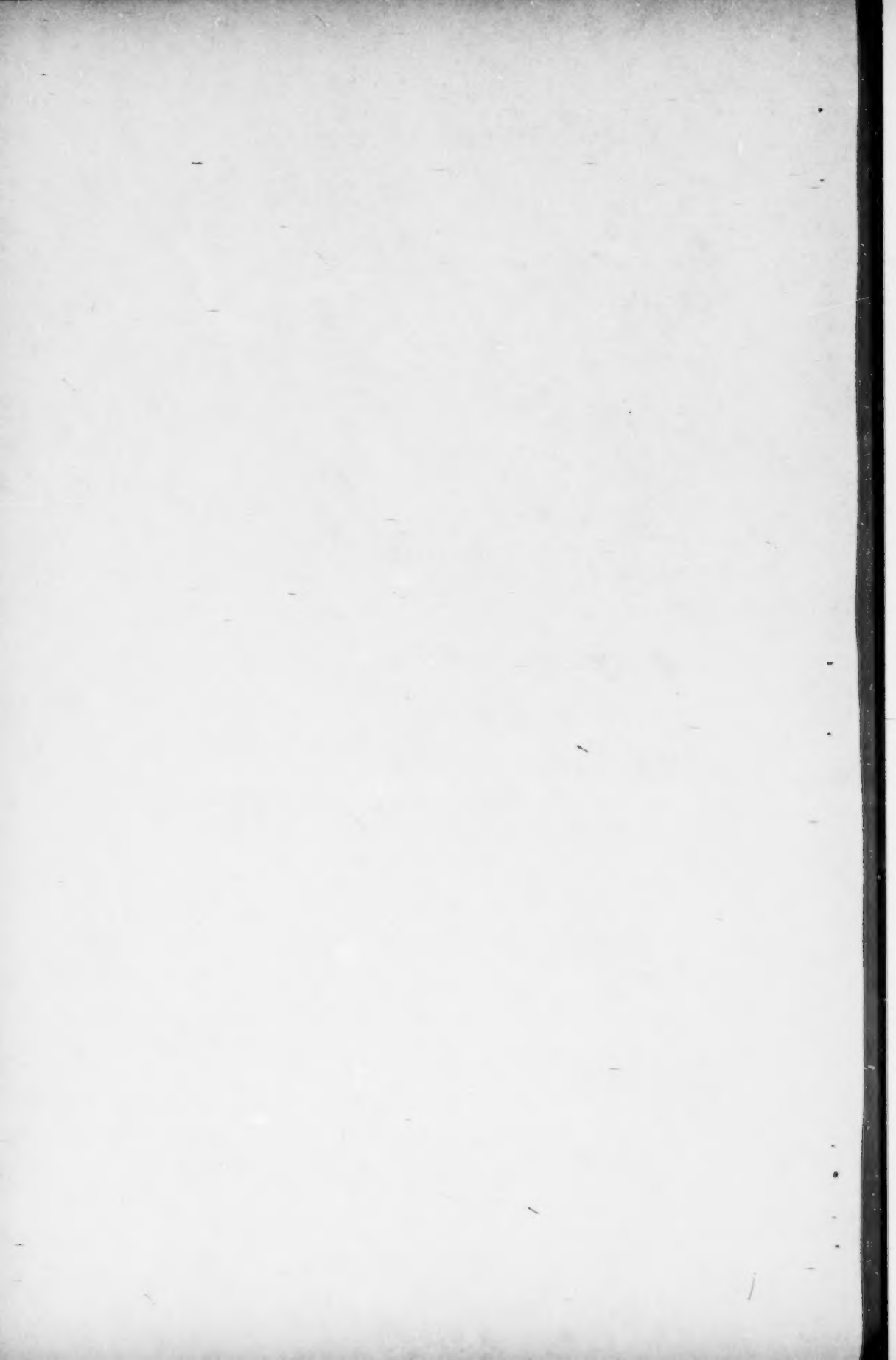
never disputed that statement at any time, and since the District Court "dismissed" McCall's action rather than granting a summary judgment, such procedural fact should be considered as admitted by Birmingham for purposes of this review.

In accordance with the authorities previously cited, if the District Court's order is deemed to be based on Birmingham's alternative motion to dismiss, the allegations in McCall's complaint and as supplemented by McCall's affidavit are to be taken as true and all reasonable inferences that may be drawn therefrom in favor of McCall should be deemed to exist. Such facts and favorable inferences provide formidable basis for McCall's standing and for a reversal of the Circuit Court's judgement.

3. Even assuming the truth of Birmingham's contention that the District Court's ruling was on Birmingham's motion for summary judgment, Birmingham still would



not be entitled to a summary judgment on the issue of McCall's standing. Birmingham's contention that there is no evidentiary support for McCall's assertion of the existence of a requisite threat of prosecution of McCall, does not conform to the operative facts and inferences. For purposes of this review, the operative facts, as set out in McCall's statement of facts and the operable inferences drawn therefrom ably provide the near necessary conclusion (as advocated in McCall's complaint) that "Birmingham will enforce the two ordinances and will arrest and prosecute McCall under the Harassment and Public Intoxication Ordinance for his intended speech. The District Court, by dismissing McCall's complaint pursuant to Birmingham's motion, and the Eleventh Circuit, by endorsing the District Court's order, and not considering the operative facts favorable to McCall, violated the near



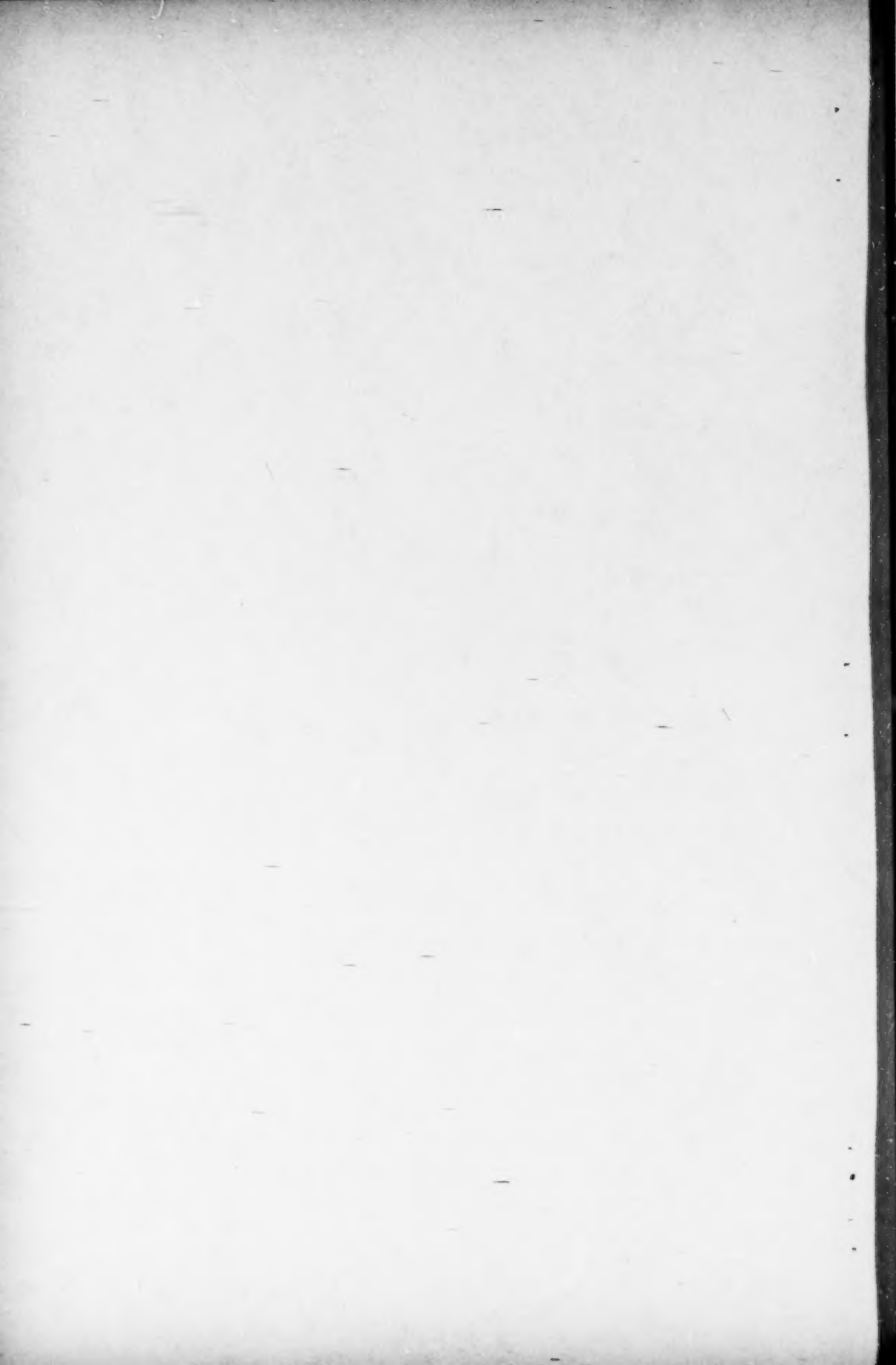
axiomatic legal standard for determining the merits of a summary judgment motion. That standard was expressed by this Court in Anderson vs. Liberty Lobby Inc., 477 US 242, 91 L Ed 202, 106 S Ct 2505 (1986), where this Court held, at 91 L Ed 2d 202, 216, that:

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgement or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiably inferences are to be drawn therefrom.

and at 91 L Ed 2d 202, 212, that:

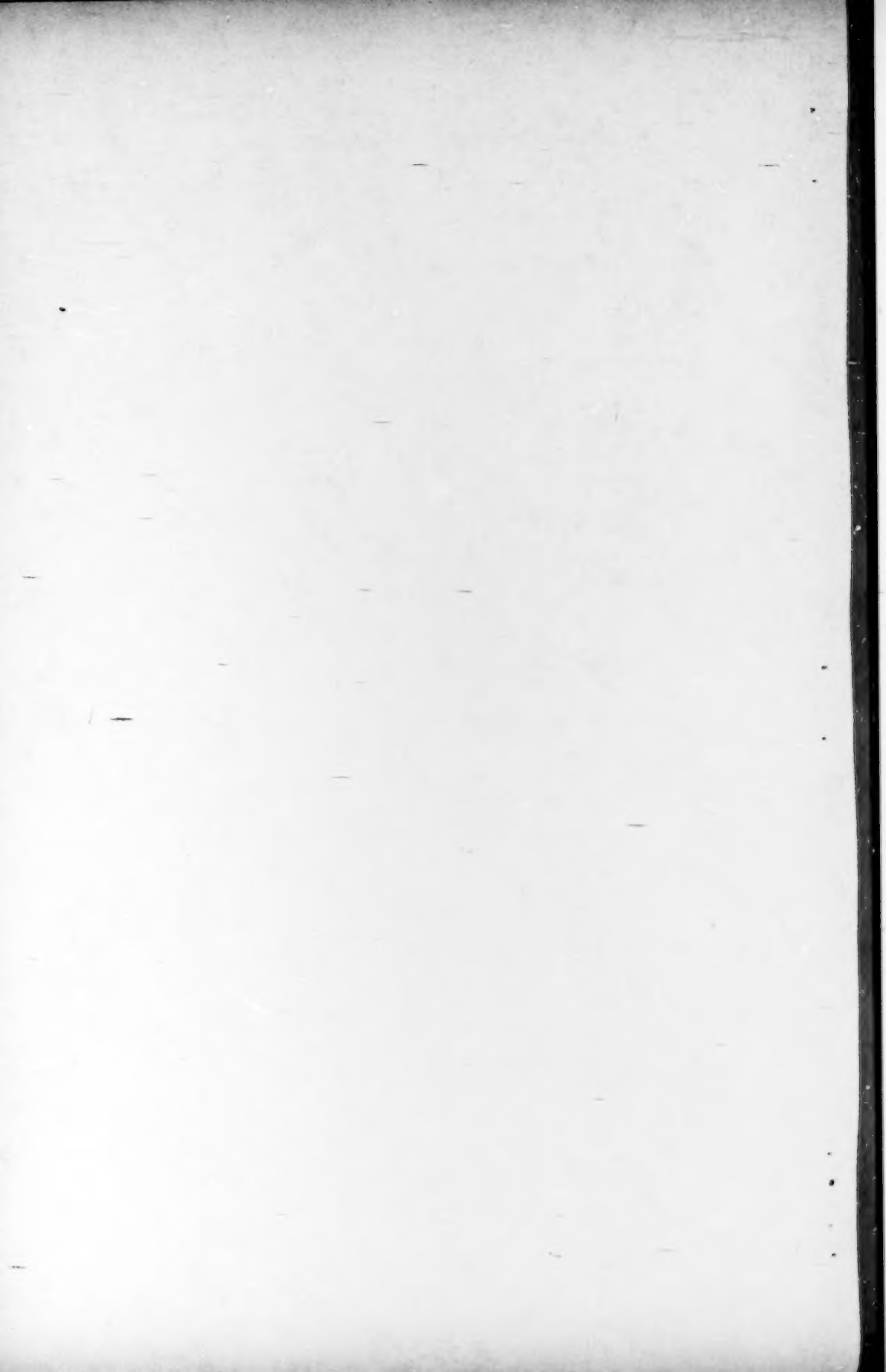
"... it is clear enough that at the summary judgement stage the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial."

See also: United States vs. Diebold, 369 US 654, 8 L Ed 176, 82 S Ct 993 (1962), which relates to the available inferences favoring the non-movant that must be considered by a



District Court in ruling on a motion for summary judgement. It is evident that the Circuit Court, through endorsement of the District Court's opinion, violated such standard by performing the function of a fact-finder and by weighing the competing inferences in favor of Birmingham, the moving party, rather than in favor of McCall, the non-moving party. It follows, that the District Court's ruling was erroneously based entirely upon the non-existent operative fact that a creditable threat of prosecution of McCall did not exist. Since the applicable operative fact, for purposes of Birmingham's motion, was that a threat of prosecution clearly existed, the Circuit Court's judgement was in error.

A brief review of some of the operative facts, not contested by Birmingham, that would, in themselves, provide the reasonable inference that a credible threat of



prosecution exists, are that: the two Birmingham ordinances exist, and have been and are continuing to be enforced; there have been previous, prior arrests under the Birmingham ordinances for the exact same speech that McCall will engage, to the exact same police officers; McCall has knowledge of the prior arrests under the ordinances for the same speech; McCall will engage in the same speech to the same police officers, as the friend previously arrested under the ordinances engaged in; McCall's friend's speech to such officers was the factual basis for the previous arrests under the Birmingham ordinances; the ordinances' proscriptions apply to McCall's speech since it is the same speech spoken to the same police officers, which provided the basis for the previous arrests of McCall's friend.

4. Birmingham, in its brief, failed to provide any argument challenging McCall's contentions that the enumerated decisions



cited by McCall in his petition established compelling authority warranting this Court's review of the Eleventh Circuit's decision.

Although commenting on other Circuit Courts' decisions, Birmingham never addressed McCall's argument that the substantial similarity between the facts and applicable law in the decisions cited by McCall, when compared to the facts and applicable law in this case, provide sound analogically reasoning that this Court should review the Eleventh Circuit's decision.

Because Birmingham's argument primarily consisted of conclusions lacking articulated reasoning, it is a logical impossibility for McCall to rebut most of such conclusions, since only the evidence and the reasons supporting Birmingham's conclusions, and not the conclusions themselves, can be argued.

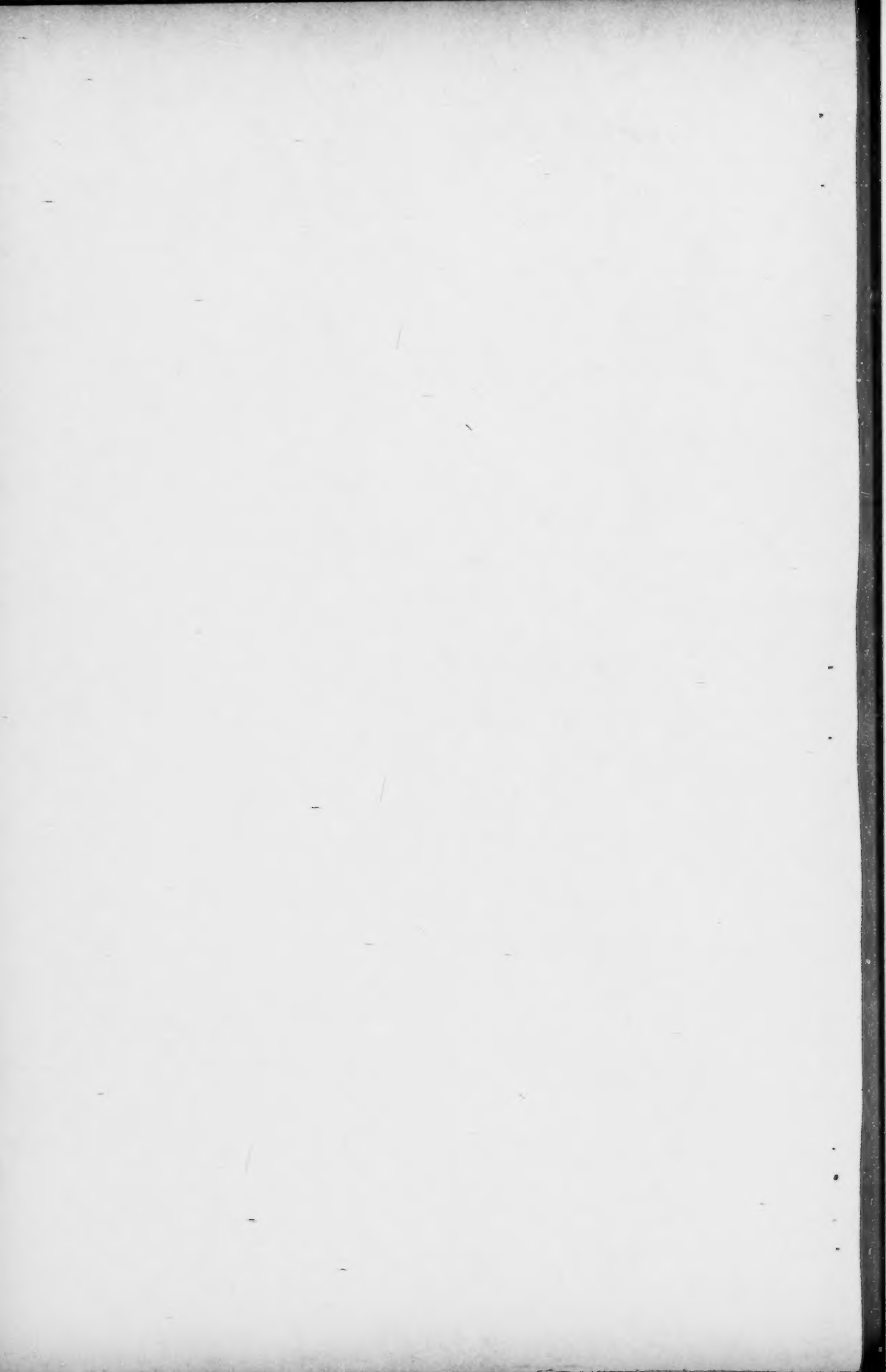
5. Contrary to Birmingham's assertion, and even if the Hardwick vs. Bowers, 760 F

2d 1202 (1985) case is the only controlling precedent, the Circuit Court fallaciously compared the circumstances of McCall's claims to those of Does' claims in the Hardwick case, and not to those of Mr. Hardwick, which have much more similarity.

6. Although Birmingham acknowledged and referred to the liberal application of the standing rule in free speech cases, Birmingham never presented any argument to refute McCall's argument that he is entitled to standing under that theory. The ordinances regulate only speech, McCall will engage in only speech, and McCall seeks, among other remedies, to have the ordinances declared unconstitutional on their face, inter alia. Birmingham never attempted to distinguish even one of the numerous decisions of this Court cited by McCall in support of his claim that he is entitled to standing under the liberal standing rules.

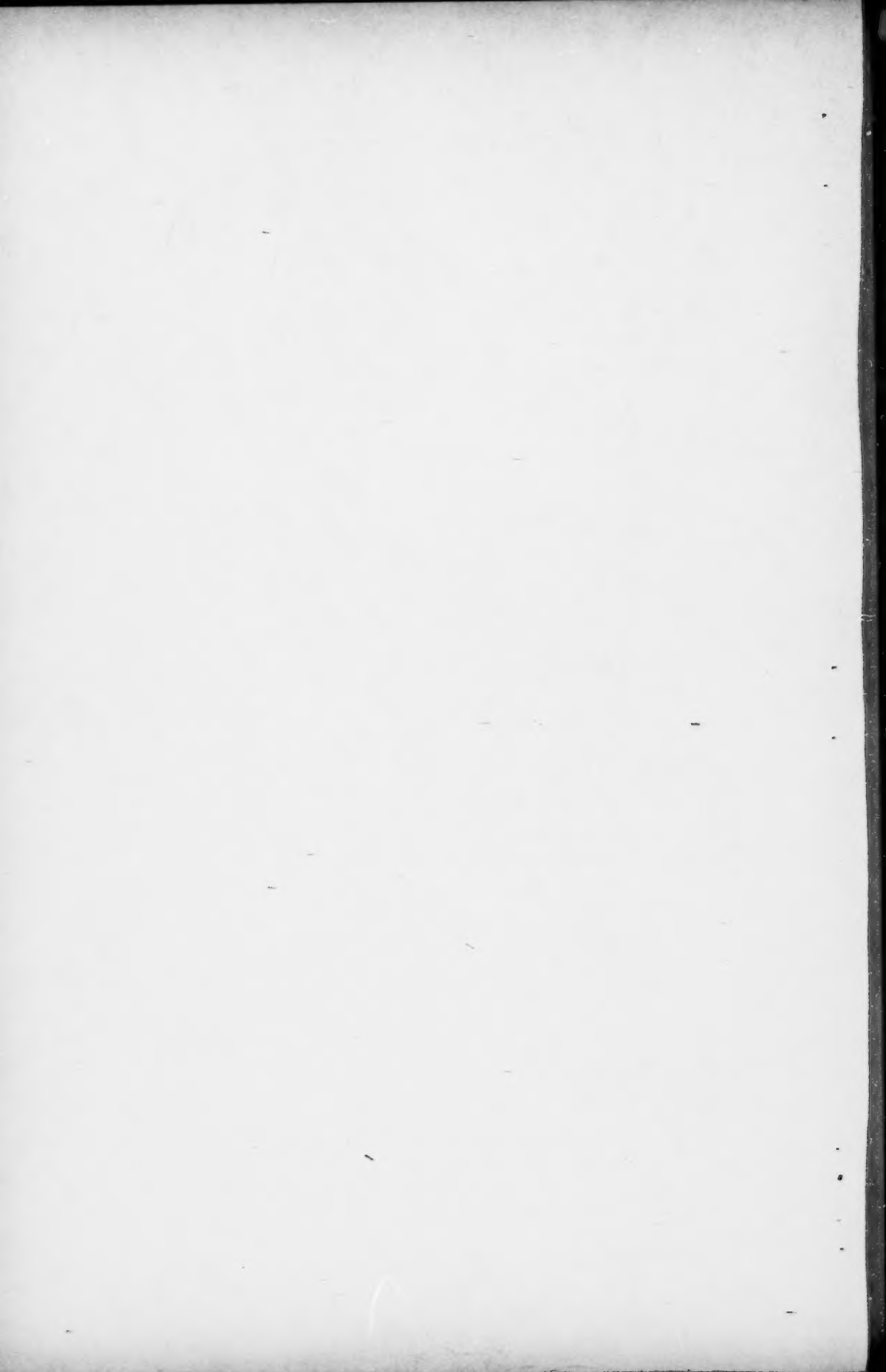
7. Since McCall's challenge is only to those "specific provisions" of the Birmingham ordinances "which have provided the basis for actual arrests for the same speech" the fact of McCall's standing is clearly established. See: Steffel vs. Thompson, 415 US 452, 39 L Ed 2d 505, 541, 94 S Ct 1209 (1974).

8. Contrary to Birmingham's contention, the very existence of the Birmingham ordinances regulating the speech described therein, overwhelmingly warrants the conclusion that each ordinance will be enforced and applied under facts in this case and that McCall has reason to fear arrest and prosecution. Even if no prior arrests of any person had been made under the Birmingham ordinances, McCall would still have standing. This Court's decision in Babbitt vs. United Farm Workers National Union, 442 US 289, 60 L Ed 2d 895, 99 S Ct 2301 (1979), at 60 L Ed 2d 895, 909, appears



to firmly support the conclusion that the mere existence of the Birmingham ordinances that regulate speech would be enough, in themselves, to provide the existence of the requisite threat of prosecution to support McCall's standing. Also since Birmingham "has not disavowed any intention of invoking the criminal penalty" under each of the ordinances, McCall "is not without some reason in fearing prosecution" for a violation of the ordinances. See: Babbitt, supra, at 60 L Ed 2d 895, 909. It would appear axiomatic that Birmingham will enforce its own ordinances otherwise the ordinances would have no deterrent effect and would thereby be ineffective in regulating conduct.

9. Birmingham in its argument, as did District Court in its opinion, dogmatically asserted that McCall is claiming protection of the rights of a third party (his friend), as distinguished from McCall's own



constitutional rights. Birmingham's assertion that various circumstances are an "unmistakable signal of a effort [by McCall] to assert rights of third parties" and that McCall is "doing nothing more than asserting a claim that, ..., his friend could not or would not bring." is unfounded. McCall's complaint and affidavit unequivocally show that McCall is seeking to protect his own constitutional rights and not those of some third party. It is McCall that seeks to and will engage in speaking; it is McCall who will be arrested; and it is McCall who will suffer the loss of his constitutional rights of freedom of speech. Rhetorically speaking, if McCall is not the appropriate party to bring this action seeking to protect his constitutional rights, what person or party would be more appropriate to bring this action.

10. Birmingham's argument with respect to prudential considerations has no



application. No circumstances exist such that any prudential standards should be considered by this Court. The thrust of McCall's claims is the protection of his constitutional rights.

11. Birmingham assertion that McCall's claims are "dreamed up" is nonsense. McCall is the only person having personal knowledge of his mental state and that mental state, as articulated in McCall's complaint and his affidavit, is deemed, under the foregoing authority and upon a motion to dismiss or for summary judgement, to be true for purposes of any ruling on Birmingham's motion.

12. Birmingham, as did the Circuit and District Courts, overlooks the standing standard established by this Court in determine if the element of fear of prosecution is present. This Court's decision in Babbitt vs. United Farm Workers National Union, 442 US 289, 60 L Ed 2d 895,



99 S Ct 2301 (1979), is abiding authority that if McCall is subject to even "a remote possibility of prosecution" he is to be accorded standing. The operative facts and inferences in this case abundantly evidence far more than a mere remote possibility that McCall will be arrested and, in fact, show that there is substantial likelihood of McCall's arrest if he engages in the speech, as described in his complaint.

13. Birmingham seems to assert, as did the District Court, that McCall is not a member of any group or classification to which the Birmingham ordinances would apply. Such an argument can not be maintained in light of the fact that the ordinances, on their face and as they have been previously applied, regulate the speech of a group that would engage in McCall's intended speech. The Birmingham ordinances are of general application and apply to the entire group of



speakers in the City of Birmingham. Clearly McCall is a member of that group.

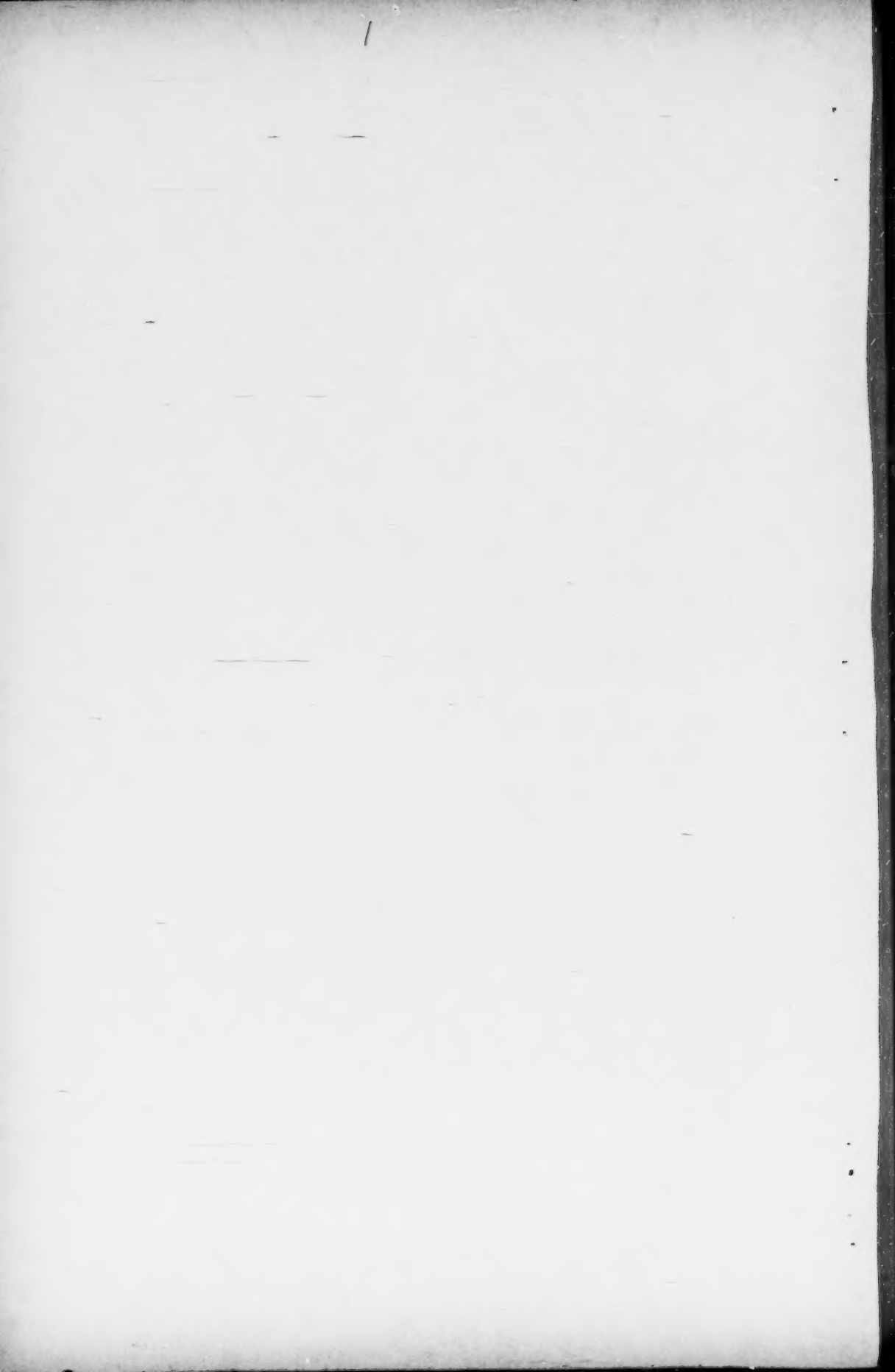
14. Birmingham fails to neutralize the Bickman v. Lashof, 620 F 2d 1238 (7th Cir., 1980), decision's conflict with the Eleventh Circuit's decision in this case. On comparison, although it was impossible for the Bickman doctor to engage in alleged constitutionally protected conduct that was regulated by the challenged statute, the Seventh Circuit confirmed the doctor's standing. On the other hand, McCall is not restricted, other than by the sanctions of the ordinances, in the exercise of his intended speech, yet, McCall, under the Eleventh Circuit's decision is not entitled to standing. What more is necessary to establish a clear, unquestionable conflict between the decisions of the Seventh and the Eleventh Circuits.

The same reasoning holds true for the decisions of the Eighth and Fifth Circuits



in United Food and Commercial Workers International Union vs. IBP, Inc., 857 F 2d 422, (8th Cir., 1988) and Kvue, Inc. vs. Moore, 709 F 2d 922 (5th Cir., 1983), respectively. Each of those decisions involve similar relevant facts and law to those in this case, yet the decisions by those two Circuits Courts directly conflict with the decision of the Eleventh Circuit in this case.

15. Birmingham's reference to this Court's decisions in Los Angeles v. Lyons, 461 US 95, 75 L Ed 2d 675, 103 S Ct. 1660 (1983) and in Whitmore vs. Arkansas, 495 US 149, 109 L Ed 2d 135, 110 S Ct 1717 (1990), are as irrelevant factually to this case as any decisions could analogically be. The Lyons case involved an issue of whether a plaintiff has standing to constitutionally attack a "chock-hold" statute, where the possibility of the plaintiff being the subject of an another "chock-hold" was so



remote as to be speculative. Any prospective application of the "chock-hold" statute was conditioned upon the occurrence of a sequence of events that were unlikely to occur and over which the Lyons plaintiff had no control. There is no such condition that must occur before McCall will engage in his intended speech.

The Whitmore case involved a plaintiff seeking to protect the constitutional rights of a third party by seeking to stop the execution of that third party, who desired to be executed. McCall clearly seeks relief for loss of only his constitutional rights and not those of a third party, as in that case.

16. Contrary to Birmingham's contentions, the importance of the issue of standing in this case, as expressly or impliedly reflected in the previously enumerated decisions of this Court in McCall's petition, provides the certiorari-



value for this Court to exercise its discretionary review.

The claims asserted in McCall's petition are of such constitutional significance that this Court should grant McCall's petition. A Federal Court's denial of a remedy, after a hearing on the merits, to protect a litigant's First Amendment rights to speak is far less constitutional destructive, than a Federal Court's total refusal to provide any forum for a merits hearing to determine if such rights exist. A denial of a Federal forum has a far more far-reaching and exhaustive "chilling affect" upon the exercise of Freedom of Speech than any state or municipal law that specifically regulating such speech.

Also, as argued in McCall's petition, the issues in this case are of such constitutional significance that if not reviewed immediately by this Court, the expression of "the will of the people" will



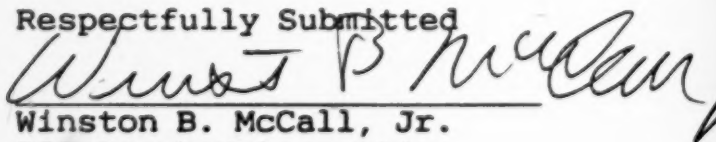
be mutated to such a extent that that constitutionally declared sovereignty will become the "will of public officials", and Abraham Lincoln's prophecy in his Gettysburg Address that our government "of the people, by the people, for the people, shall not perish from the earth" will be proved to be a hoax.

CONCLUSION

For the reasons stated above and previously in McCall's petition, it is respectfully requested that the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals be granted, and further that this Court summarily reverse that decision.

Dated: October 8, 1991

Respectfully Submitted



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